

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7244

IN THE UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT



IRVIN GILL, ROBERT ZIEGLAR, KATHERINE HARRIS,
MARIE FITZHUGH, CHARLES CAMPBELL, INEZ PAGE,
DOROTHY DOBSON, RAVELLA FLOYD, INEZ CHARLES,
EVELYN FAIRWELL, ALICE ZEALY, GEORGE HOLMES,
ENOCH MORRISON, RUBY BLACKWELL, ROSIE LEE
SAILES, BETTY JO TRAVIS, DOROTHY LATHAM, LUTHER
ROBINSON, ELADIA FUENTES, VELMA WILLIAMS, DOLORES
ALLEN, VIVIAN SILAS, BEATRICE HILL, SELENA
MATHEWS, ANNIE HICKS, HARRIET WEATHERS,
LINDA GAFFNEY, GRACE RUTHERFORD, DORETHA DIGGS,
STELLA HOLMES MCDONALD, DAISY MAE BANKS,
MICHELLE COURNOYER, LUZ MARTINEZ,
MARIE WARE, ALBERTA FERGUSON, SAIDE JOHNSON,
Individually and on behalf of all other persons
similarly situated,

Plaintiffs-Appellants

-vs-

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES
REED, DIRECTOR OF MONROE COUNTY DEPARTMENT OF
SOCIAL SERVICES, MONROE COUNTY CIVIL SERVICE
COMMISSION, OFFICE OF CIVIL SERVICE & PERSONNEL OF
MONROE COUNTY, FRED LAPPLE, EXECUTIVE DIRECTOR,
OFFICE OF CIVIL SERVICE & PERSONNEL OF MONROE
COUNTY, GABRIEL RUSSO, DIRECTOR OF HUMAN
RESOURCES OF MONROE COUNTY AND MONROE COUNTY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

Emmelyn Logan-Baldwin
Attorney for Plaintiffs-Appellants
510 Powers Building
Rochester, New York 14614

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
STATUTES INVOLVED.....	v
STATEMENT OF THE ISSUES PRESENTED.....	vii
STATEMENT OF THE CASE.....	1
ARGUMENT	
POINT I - THE COMPLAINT STATES CLAIMS OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 1981 and 1983 AND THE UNITED STATES CONSTITUTION; ALL CLAIMS HAVE BEEN TIMELY FILED.....	11
POINT II - THE COURT ERRED IN SUMMARILY DISMISSING PLAINTIFFS' CLAIMS WITHOUT ALLOWING PLAINTIFFS AN OPPORTUNITY TO PURSUE DISCOVERY.....	29
CONCLUSION.....	31

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp. 1355 (D.Mass. 1969).....	17
Association of Data Processing Organizations, Inc., v. Camp, 397 U.S. 150 (1970).....	24
Baker v. Carr, 369 U.S. 186 (1962).....	24
Bartmess v. Drewrys U.S.A. Inc. 444 F.2d 1186 (7th Cir. 1971) <u>cert. den.</u> 404 U.S. 939 (1971).....	22
Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972).....	22
Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).....	16
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).....	15
Brady v. Bristol-Mevers, Inc., 459 F.2d 621 (8th Cir. 1972).....	16
Bridgeport Guardians v. Bridgeport Civil Service Commission, 354 F.Supp. 778 (D.Conn. 1973) modified 482 F.2d 1333, 6 E.P.D. ¶8755 (2nd Cir. 1973).....	17
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) <u>cert. den.</u> 409 U.S. 982 (1972).....	16,30
Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971) <u>cert. den.</u> 405 U.S. 916 (1972).....	16
Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) modified 452 F.2d 327 (8th Cir.) <u>cert. den.</u> 406 U.S. 950 (1972).....	17

<u>Cases</u>	<u>Page</u>
Castro v. Beecher 334 F.Supp. 930 (D. Mass. 1971) modified 459 F.2d 725 (1st Cir. 1972) consent decree on remand 365 F.Supp. 655, 5 E.P.D. 18568 (D. Mass. 1973).....	17
Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972).....	18
Chiaffitelli v. Dettmer Hospital, Inc. 437 F.2d 429 (6th Cir. 1971).....	18
Conley v. Gibson, 355 U.S. 41 (1957).....	15
Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).....	22
Cypress v. Newport News General & Nonsectarian Hospital Assoc. 375 F.2d 648 (4th Cir. 1967).....	18
DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975) mod. 520 F.2d 409 (2nd Cir. 1975).....	20
Dudley v. Textron, Inc., Burkart-Randall Division, 386 F.Supp. 602 (E.D. Pa. 1975).....	21,22,23
Egelston v. State University College at Geneseo, Slip Opinion No. 1050, Second Circuit Court of Appeals, June 7, 1976.....	15,29,30
Fowler v. Schwarzwalder, 348 F.Supp. 844 (D. Minn. 1972) and 351 F.Supp. 721 (D. Minn. 1972).....	17
Graniteville Co., v. E.E.O.C., 438 F.2d 32 (4th Cir. 1971).....	30
Green v. McDonnell Douglas Corp. 411 U.S. 792 (1973)....	30
Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973).....	19
Griggs v. Duke Power Co., 401 U.S. 424 (1971).....	21
Hacket v. McGuire Brothers, Inc., 445 F.2d 442 (3rd Cir. 1971).....	16

<u>Cases</u>	<u>Page</u>
In the Matter of Caparco v. Kaplan, 20 A.D. 2d 212 (4th Dept. 1964).....	27
Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th Cir. 1970).....	18
Johnson v. Louisiana State Employment Service, 301 F.Supp. 675 (W.D. La., 1968).....	18
Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 9 E.P.D. ¶10,149.....	19
Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) <u>cert. den.</u> 401 U.S. 954 (1971).....	30
Kaiser v. Cahn, 510 F.2d 282 (2nd Cir. 1974).....	23
Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).....	16,22
Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971).....	30
Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).....	14
Mizell v. North Broward Hospital District, 427 F. 2d 468 (5th Cir. 1970).....	18
Noble v. University of Rochester, Slip Opinion No. 1115, Second Circuit Court of Appeals, June 7, 1976.....	15,29,30
Oatis v. Crown Zellerback Corp., 398 F.2d 496 (5th Cir. 1968).....	14,15
Olson v. Miller, 263 F.2d 738 (D.C. Cir. 1959).....	28,29
Pacific Maritime Assoc. v. Quinn, 491 F.2d 129 ⁴ (9th Cir. 1974).....	22
Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).....	15,30
Payne v. Ford Motor Co., 461 F.2d 1106 (8th Cir. 1972) per curiam reversal.....	16

<u>Cases</u>	<u>Page</u>
Pennsylvania v. O'Neill, 348 F.Supp. 1084 (E.D. Pa. 1972) modified 473 F.2d 1029 (3rd Cir. 1973).....	17
Rich v. Martin-Marietta Corp., 522 F.2d 333 (10th Cir. 1975).....	22
Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970). <u>cert. denied</u> , 401 U.S. 948 (1971).....	16
Schaefer v. Tannin, 394 F.Supp. 1128 (E.D. Mich. 1974).....	15
United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970).....	30
United States v. Jackson Terminal Co., 451 F. 2d 418 (5th Cir. 1971) <u>cert. den.</u> 406 U.S. 906 (1972)....	30
Waters v. Wisconsin Steel Workers of International Harvester Co., 427 F.2d 476 (7th Cir.,) <u>cert. denied</u> 400 U.S. 911 (1970).....	16
Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Cal. 1972).....	17
Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1204 n.2 (2nd Cir. 1972).....	16
Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971).....	16

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e)

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, First Amendment

Congress shall make no law respecting...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Ninth Amendment

The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF ISSUES PRESENTED

1. Does the complaint state a claim of employment discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981, 42 U.S.C. §1983 or the United States Constitution, Fourteenth Amendment?
2. Do the plaintiffs have standing to file claims of employment discrimination?
3. Have the plaintiffs timely filed their claims of employment discrimination?
4. Did the court err in dismissing the complaint for failure to join "indispensable" parties when those parties are subject to court process?
5. Did the court err in dismissing plaintiffs' claims of employment discrimination when plaintiffs had duly noticed discovery proceedings prior to the motions to dismiss and where plaintiffs demonstrated that the information substantiating their claims is in the control of the defendants?

STATEMENT OF THE CASE

This is an appeal from the Order and Decision of the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York dated April 21, 1976, which order and decision dismisses plaintiffs' complaint of employment discrimination against the defendants brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 1981 and 1983 and the United States Constitution, the First, Ninth, and Fourteenth Amendments. The Order and Decision which is unreported appears in the Joint Appendix at pages 312, 313.

Plaintiffs filed this lawsuit for injunctive relief, declaratory judgment and money damages to redress acts of discrimination in employment on the basis of race, sex and national origin on November 24, 1975. (A. 2) The action was commenced within 90 days of the receipt by certain named plaintiffs of Right to Sue Notices from the United States Department of Justice on October 14, 1975. (A. 4, 59-126)

The filing of the lawsuit was preceded by plaintiffs Gill, Ziegler and Fitzhugh filing comprehensive charges of class-wide employment discrimination with the New York State Division of Human Rights in September 1973. In September 1973 plaintiffs Gill, Ziegler, Fitzhugh, Harris, Campbell, Hicks, Page, Gaffney, Floyd, Fairwell, Mathews, Sailes, Zealy, Rutherford, Weathers, Holmes, Morrison, Blackwell, Dobson, Cournoyer, Robinson, Travis, Latham, Charles, Diggs, Silas, ^{et al.}

McDonald, Banks, Fuentes, Allen, Martinez, Hill and Williams filed comprehensive charges of employment discrimination against the defendants with the Equal Employment Opportunity Commission. The Commission found reasonable cause to believe discrimination in employment had occurred and was occurring. The Commission's conciliation efforts thereafter failed and Right to Sue Notices were issued to the complainants before the Commission.¹ (A.260-262, 280,287)

The plaintiffs are present, past and/or prospective employees of the Monroe County Department of Social Services. Plaintiffs Gill, Zieglar, Harris, Fitzhugh, Floyd, Allen, Campbell, Dobson, Charles, Zealy, Sailes, Travis, Robinson, Martinez, Page, Latham, Fairwell, Holmes, Morrison, Blackwell, Williams, Diggs, Banks, Ware, Ferguson, Fuentes, Silas, Mathews, Hicks, Weathers and Johnson are presently employed by the Department of Social Services and have been employed for some time. Plaintiffs Rutherford, Gaffney, and McDonald were employed by the Department of Social Services at the time of their filing their claims of employment discrimination with the Equal Employment Opportunity Commission but have recently resigned that employment-March, 1975, September, 1975 and May, 1975 respectively. Plaintiff Hill tried unsuccessfully to obtain employment with the Department of Social Services just before filing charges of denial of employment because of race with the Commission. All the plaintiffs with the

¹ The Commission inadvertently failed to forward a Right to Sue Notice to Martinez. -2-

exception of Martinez, Ware, Ferguson, and Johnson have had their comprehensive claims of employment discrimination against the defendants processed and investigated by the Commission with the Commission finding "reasonable cause" to believe discrimination has occurred and is occurring as alleged and with the Commission issuing Right to Sue Notices.¹

Plaintiffs allege that the defendants maintain policies and practices of discriminating against their minority employees and prospective minority employees. Defendants maintain a policy and practice of discriminating against their minority employees by excluding them from certain job classifications including but not limited to job classifications of managerial and policy-making levels with high pay and status. Defendants maintain a policy, practice, custom and usage of paying minority employees less than their white counterparts, particularly white males, when the education, skill and

¹Subsequent to the issuance of Right to Sue Notice to her and her authorizing initiation of this lawsuit, plaintiff Michelle Cournoyer concluded for personal reasons to seek voluntary discontinuance of her claims. That request was submitted to the court below. No action was taken by the court on this request. Plaintiff Cournoyer has not appealed the court's dismissal. (A. 309-311)

professional competence of the minority employee equals or exceeds that of the white employee engaged in the same or similar work. Defendants discriminate against the plaintiffs by maintaining a policy, practice, custom and usage of recruitment of employees which is directed to seeking and hiring only whites, particularly white males, for the best-paying, career, oriented jobs. Defendants maintain a policy, practice, custom and usage of excluding minorities from training programs and/or opportunities to which whites, particularly white males, with the equivalent or less education and skills are enrolled and are afforded opportunity either at the commencement of their employment or during certain stages of their employment. Defendants maintain a policy, practice, custom and usage of promotion which is directed to seeking and promoting only whites, particularly only white males for the best-paying, career-oriented jobs. Defendants maintain a policy, practice, custom and usage of transferring employees which is directed to seeking and transferring only whites, particularly white males for the best-paying, career oriented jobs. Defendants maintain a policy, practice, custom and usage of denying their minority employees titles, pay and job status to which they are entitled by virtue of their job functions, performances, background and experience. Defendants maintain a policy, practice, custom and usage of administering tests and other

appointment criteria for positions which are not validated pursuant to law in that they are not relevant to the qualifications for the job. These tests are administered so that the white employees receive jobs while minority employees are excluded from jobs. (A. 12-15)

Defendants maintain a policy, practice, custom and usage of excluding minorities from employment opportunities by making provisional appointments of whites, particularly white males to jobs so that the whites receive on-the-job training prior to being tested for permanent appointments. The provisional appointments of whites have consistently continued beyond two years without the administering of competitive examinations-all in direct violation of law. Defendants discriminate against the plaintiffs and other minorities by maintaining a policy, practice, custom and usage of varying job standards and/or qualifications to accommodate employment for white employees. Defendants maintain a policy, practice, custom and usage of using subjective evaluation techniques in judging their employees' performance which operate to favor employment opportunities for white employees. Defendants maintain a policy, practice, custom and usage of failing to post job openings, days for examinations for jobs, provisional status of appointments-all to the advantage of the white employees. Defendants maintain a policy, practice, custom and usage of using word-of-mouth

recruitment for positions thereby enhancing employment opportunities for white employees. Defendants maintain a policy, practice, custom and usage of appointing white employees for jobs from civil service lists not related to the job. Defendants maintain a policy, practice, custom and usage of giving white employees travel monies and opportunities to represent the defendants at meetings and conferences while denying those opportunities to minority employees. Defendants maintain a policy, practice, custom and usage of fostering an atmosphere in the employment situation which is calculated to harass, embarrass, humiliate and thereby cause the minority employee to "keep his/her place." Defendants maintain a policy, practice, custom and usage of retaliating against their minority employees for complaining of the illegal employment practices. Defendants maintain a policy, practice, custom and usage of assigning their personnel so that black personnel work only with black clientele and white personnel work only with white clientele and Spanish surnamed personnel work only with Spanish surnamed clientele. (A. 15-17)

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated. The class sought to be represented consists of minority persons who have been employed, are employed or might be employed or have made application to be employed by the defendants and who because of the illegal discriminatory practices of the

defendants have been denied employment and/or advancement opportunities by the defendants. (A. 11, 264-266)

The defendants are either the present employers, past employers or prospective employers of the plaintiffs.

Defendant Monroe County Department of Social Services is the department in which plaintiffs either are employed, have been employed and/or have sought employment. Defendant James Reed is the current director of that department.

Defendant Monroe County Civil Service Commission and Office of Civil Service and Personnel of Monroe County share responsibility for selection of Monroe County employees with various County departments, including, defendant Monroe County Department of Social Services. Defendant Fred Lapple is the current Executive Director of the Office of Civil Service and Personnel of Monroe County. Defendant Monroe County is a political subdivision of the State of New York.

(A. 10, 257,259,278)

Following service of the summons and complaint on defendants on December 1, 1975, they appeared by counsel filing what purported to be answers, affirmative defenses, motions to dismiss and counterclaims. Plaintiffs replied to the counterclaims and duly noticed discovery. Plaintiffs' Notice to Produce, dated Decmeber 30, 1975 required production of documents at the offices of plaintiffs' attorney on

February 4, 5 and 6, 1976. Plaintiffs' First Interrogatories dated December 31, 1975 were served by mail January 2, 1976. Depositions in notices dated January 6, 1976 were noticed for defendants and/or agents and/or employees of the defendants for January 20, 1976, February 2, 1976, February 9, 1976 and February 11, 1976. (A.154, 157, 160-227)

Thereafter, by motions dated January 14, 1976 and January 16, 1976, defendants moved to dismiss the complaint alleging among other grounds that no cause of action has been stated under any of the statutes pleaded, the plaintiffs lacked standing to bring this lawsuit, the claims were not timely filed and the New York State Department of Social Services and the New York State Civil Service Commission are indispensable parties.¹ Defendants requested a protective order from plaintiffs' discovery, alleging in conclusory fashion that the discovery requests were burdensome, intended to harass the defendants and duplicative of discovery already ordered in proceedings before the New York State Division of Human Rights. (A. 229-251)

Plaintiffs opposed the motion to dismiss noting that it was untimely filed subsequent to what purported to be the

¹ The lower court had indicated to attorneys for defendants by letter of December 30, 1975 that he did not construe previous papers filed by the defendants to be a motion to dismiss. (A. 303)

answer, the complaint states claims of employment discrimination under the Constitution, Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§1981 and 1983- all of which claims had been timely filed since the employment discrimination is continuing. All of the plaintiffs were employed by the defendants at the time of filing their claims and/or are employed by the defendants and/or have sought employment with the defendants. Standing is conferred by Title VII on these persons. There are no indispensable parties not before the court since defendants named have full control over the employment of the plaintiffs and the policies affecting the terms, conditions and privileges of employment of the plaintiffs. Plaintiffs underscored that the general objection to discovery offered by the defendants was insufficient as a matter of law and that all of the discovery noticed in this lawsuit is relevant according to numerous decisions in the area of employment discrimination. Plaintiffs urged that the court make no decision on defendants' motions until plaintiffs had an opportunity to complete the discovery already noticed. Information confirming contentions of the plaintiffs is within the exclusive control of the defendants. (A. 251-278)

Notwithstanding the untimeliness of defendants' motion to dismiss and notwithstanding the legal insufficiency of

defendants' objections to discovery, the lower court entertained the motions to dismiss at time of argument, February 9, 1976 and stayed all discovery pending decision on the motion. (A. 2) The lower court issued decision and order dated April 21, 1976 dismissing all causes of action as to all defendants, giving no reasons for its decision but concluding that "...the action is dismissed on the following grounds: Failure to state a cause of action, plaintiffs' lack of standing to bring this suit, the action is barred by the statute of limitations and the New York State Department of Social Services and the New York State Civil Service Commission and their respective directors are indispensable defendants." (A. 313)

Plaintiffs appeal on the law and the facts from each and every part of Judge Burke's order and decision.

ARGUMENT

POINT I

THE COMPLAINT STATES CLAIMS OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 1981 and 1983 AND THE UNITED STATES CONSTITUTION; ALL CLAIMS HAVE BEEN TIMELY FILED.

Plaintiffs' claims arise under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972, 42 U.S.C. §2000(e)5(f), 42 U.S.C. §1981, 42 U.S.C. §1983 and the United States Constitution, the First, Ninth and Fourteenth Amendments. Each of these provisions of law provides a separate basis for the court's consideration of plaintiffs' claims.

(A) Title VII of the Civil Rights Act of 1964

Since the 1972 amendments to Title VII of the Civil Rights Act of 1964, all units of state and local government and their agencies are subject to this law. 1 CCH Employment Practices Guide ¶861; 42 U.S.C. §§2000e (a), 2000e(f). The law forbids any employer, here any entity of state or local government or any unit or agency thereof, from denying any person, on the basis of race, color, religion, sex or national origin, any term, condition or privilege of employment; a person is entitled to the privilege of working in an environment free of bias. 42 U.S.C. §2000e-2(a)(1).

Persons who may complain of violations of the law, include, of course, present employees, past employees and/or prospective employees. A charge under Title VII may be filed with the Equal Employment Opportunity Commission by any person claiming to be aggrieved by an illegal employment practice and/or by others on behalf of any aggrieved person. 42 U.S.C. §2000e-5(b); 1 CCH Employment Practices Guide ¶2315. White employees have standing to file a charge of employment discrimination based on discrimination against their fellow workers. Any employee may have standing to file a charge of job bias alleging commission of any unlawful employment practice by an employer since such discrimination constitutes a term or condition of employment for all employees. EEOC Decision No. 70-09, Case No. NO. 68-8-257E, July 8, 1969.

Where there is a state law against discrimination in employment, an individual who files with the Equal Employment Opportunity Commission has three hundred (300) days from the conclusion of the last act of discrimination within which to file a complaint. 42 U.S.C. §2000e-5(e). If complaint is made of employment policies, practices, customs and usages, the complaint alleges discrimination of a continuing nature; the measuring of the time period for filing does not begin to run until the effect of the policy, practice, custom or usage has ceased. See Equal Employment Opportunity Commission

Manual excerpt, attached hereto and made a part hereof as Appendix A.

All of the plaintiffs before the court in this case are aggrieved persons within the meaning of Title VII. All are present, past and/or prospective employees of the Monroe County Department of Social Services. Plaintiffs Gill, Ziegler, Harris, Fitzhugh, Floyd, Allen, Campbell, Dobson, Charles, Zealey, Sailes, Travis, Robinson, Martinez, Page, Latham, Fairewell, Holmes, Morrison, Blackwell, Williams, Diggs, Banks, Ware, Ferguson, Fuentes, Silas, Mathews, Hicks, Weathers and Johnson, are presently employed by the Department of Social Services and have been employed for some time. Plaintiffs Rutherford, Gaffney and McDonald were employed by the Department of Social Services at the time of their filing their claims of employment discrimination with the Equal Employment Opportunity Commission but have recently resigned that employment-March, 1975, September 1975 and May 1975 respectively. Plaintiff Hill tried unsuccessfully to obtain employment with the Department of Social Services just before filing charges of denial of employment because of race with the Commission. All the plaintiffs with the exception of Martinez, Ware, Ferguson and Johnson have had their comprehensive claims of employment discrimination against the

defendants processed and investigated by the Commission with the Commission finding "reasonable cause" to believe discrimination has occurred and is occurring as alleged and with the Commission issuing Right to Sue Notices.¹

The plaintiffs who received the Right to Sue Notices and charge the defendants with department-wide employment discrimination have properly joined as plaintiffs the four persons, Martinez, Ware, Ferguson and Johnson, pursuant to Title VII since it is unnecessary that all persons who claim class-wide discrimination process those claims with the Commission. Once a person has filed the claims of class-wide discrimination with the Commission the other claims can be joined in the lawsuit. Oatis v. Crown Zellerback Corp., 398 F.2d 496 (5th Cir. 1968); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

Title VII clearly covers all the claims that the plaintiffs herein make against the defendants. The

¹ Plaintiff Martinez filed her claims of employment discrimination with the Equal Employment Opportunity Commission. However, the Commission inadvertently omitted her name from its finding of reasonable cause and therefore did not forward the Right to Sue Notice.

discrimination alleged includes, without intending to limit, discriminatory recruiting and hiring practices, discriminatory classification practices, discriminatory transfer and promotion practices, discriminatory testing procedures and discriminatory pay, evaluation and training procedures. There are now numerous decisions under Title VII establishing that complaints such as the complaint herein state good causes of action. Egelston v. State University College at Geneseo, Second Circuit Court of Appeals, June 7, 1976, Slip Opinion No. 1050; Noble v. University of Rochester, Second Circuit Court of Appeals, June 7, 1976, Slip Opinion No. 1115, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), Oatis v. Crown Zellerback Corp., 398 F.2d 496 (5th Cir. 1968); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970)¹

The defendants are employers within the meaning of Title VII. In fact, the defendants have admitted this in their answers (A. 137,145) Both the institution or agency and the individual defendants are employers within the meaning of Title VII. Schaefer v. Tannin, 394 F.Supp. 1128 (E.D. Mich. 1974).

(B) 42 U.S.C. §1981

Long before Title VII became applicable to state and

¹On a motion to dismiss the complaint must be given its most liberal reading. A complaint may not be dismissed unless it is clear without a doubt that the plaintiffs cannot set forth any set of facts to support the claim upon which relief can be granted. Conley v. Gibson, 355 U.S. 41 (1957); Egelston v. State University College at Geneseo, Slip Opinion No. 1050, Second Circuit, June 7, 1976; Noble v. University of Rochester, Slip Opinion No. 1115, Second Circuit, June 7, 1976.

local governments and their agencies, courts held that 42 U.S.C. §1981, part of the Civil Rights Act of 1866, is a basis for suit against both public and private employers who discriminatorily deny any term, condition or privilege of employment. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1204 n. 2 (2nd Cir. 1972); Payne v. Ford Motor Co., 461 F.2d 1106 (8th Cir. 1972) (per curiam reversal); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Belt v. Johnson Motor Lines, Inc., 458 F. 2d 443 (5th Cir. 1972) summary calendar reversal); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972); Hacket v. McGuire Brothers, Inc., 445 F.2d 442 (3rd Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Workers of International Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970).

The remedy which the courts recognize under 42 U.S.C. is separate and complete from that provided by Title VII.

The Congress in the legislative history to the 1972 amendments to Title VII specifically preserved the §1981 remedy. 118 Cong. Rec. 1458, 1459, 1521, 1522, 1523-1526, 1793-1797; H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 18-19 (1971).

(C) 42 U.S.C. §1983

Just as the courts have held that 42 U.S.C. §1981 is a basis for claiming denial of equal terms, conditions and privileges of employment by state or local governments and their agencies, so too, the courts have held that 42 U.S.C. §1983 is a basis for such suits. Thus, officers of fire departments, police departments, and transportation authorities cannot engage in discriminatory employment policies. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972); Fowler v. Schwarzwalder, 348 F.Supp. 844 (D. Minn. 1972) and 351 F.Supp. 721 (D. Minn. 1972); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Cal. 1972); Bridgeport Guardians v. Bridgeport Civil Service Commission, 354 F.Supp. 778 (D.Conn. 1973), modified, 482 F.2d 1333, 6 E.P.D. ¶8755 (2nd Cir. 1973); Pennsylvania v. O'Neill, 348 F.Supp. 1084 (E.D. Pa. 1972), modified 473 F.2d 1029 (3rd Cir. 1973); Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971), modified 459 F.2d 725 (1st Cir. 1972), consent decree on remand 365 F.Supp. 655, 5 E.P.D. ¶8586 (D. Mass. 1973); Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp. 1355

(D. Mass. 1969). Similarly, public boards of education and public or semi-public hospitals cannot engage in discriminatory employment practices, nor can state employment services engage in discriminatory referral practices. Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972); Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th Cir. 1970); Chiaffitelli v. Dettmer Hospital, Inc., 437 F.2d 429 (6th Cir. 1971); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); Cypress v. Newport News General & Nonsectarian Hospital Association, 375 F.2d 648 (4th Cir. 1967); Johnson v. Louisiana State Employment Service, 301 F.Supp. 675 (W.D. La. 1968).

Plaintiffs acknowledge that the word "person" in §1983 has been interpreted as not to include a municipality; however, plaintiffs herein are not merely suing municipalities or municipal departments, plaintiffs are suing individuals who they allege are acting illegally and under color of law to deprive them of their rights to equal employment opportunities. These individuals include James Reed who heads the Monroe County Department of Social Services, Fred Lapple who heads the Monroe County Civil Service Commission and the Office of Civil Service and Personnel of Monroe County and Gabriel Russo who is the Director of Human Resources of Monroe County. All of these individuals have deprived plaintiffs of their rights to equal employment opportunities.

The applicability of §1983 to illegal employment practices of agents and officials of local or state government is in no way limited or affected by the more recent applicability of Title VII to illegal employment practices. Johnson v. Railway Express Agency, 421 U.S. 454 (1975), 9 E.P.D. ¶10, 149. See also references to Congressional Record noted above. All the acts of discrimination that the plaintiffs allege against the defendants herein are actionable under §1983 since the effective date of this act is 1871.

(D) United States Constitution

The Fourteenth Amendment of the United States Constitution prohibits any state or any subdivision of a state from denying any person "equal protection of the laws" or life, liberty, or property without "due process of law." These prohibitions encompass a state or any subdivision thereof denying any person equal terms, conditions or privileges of employment. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); see also, Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973). The Constitution of the United States has been applicable to all defendants before the court during the respective employments of each plaintiff or during the times when employment was sought by each of the plaintiffs. All of plaintiffs' claims are properly before the court because the acts of the defendants to deny plaintiffs equal employment opportunities are violations of the guarantee to equal protection of the laws.

As noted above in the discussion of jurisdiction pursuant to Title VII, a term, condition and privilege of an employment is the right to work in an atmosphere free from race, sex, or national origin discrimination. A white employee therefore can properly charge discrimination under Title VII. Further, a white employee can invoke the civil rights statutes of 1866 to remedy employment discrimination. DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975), mod., 520 F.2d 409 (2nd Cir. 1975). And, any person has the separately guaranteed constitutional rights to freedom of association under the First and Ninth Amendments to the Constitution, which if violated by a state or subdivision thereof are actionable pursuant to the Fourteenth Amendment.

(E) All of Plaintiffs' Claims Have Been Timely Filed

As previously noted herein, all the claims of the plaintiffs against the defendants are of continuing employment discrimination. The acts of the defendants have denied and continue to deny each plaintiff opportunity for employment, or advancement, promotion, equal pay, training opportunities for example. Because the discrimination of the defendants is continuing, the time period in which plaintiffs need to file their charges-after the last act of discrimination and/or after the last effect of the policy of discrimination-has not even begun to run on the claims.

It should be underscored that every plaintiff herein was an employee of the defendants at the time these claims of employment discrimination were filed with the Equal Employment Opportunity Commission, with the exception of plaintiff Hill, who had just been denied employment by the defendants prior to the filing of her claims with the Commission.

Only recently has the employment of three plaintiffs, Rutherford, McDonald and Gaffney, been discontinued. Thus, each illegal employment practice of the defendants has continued to operate to deny the plaintiffs equal employment opportunities or was doing so at the time of filing their claims with the Commission.

The Equal Employment Opportunity Commission found all the claims of the plaintiffs to be timely filed. This determination by the Commission, the administrative agency empowered by statute to enforce Title VII, is entitled to great weight. Griggs v. Duke Power Co., 401 U.S. 424 (1971). See also, Rules of Procedure of the Equal Employment Opportunity Commission submitted herewith as Appendix A.

Courts have long recognized the continuing nature of employment discrimination and have held that time for the initiation of the running of the statutory requirement for filing a complaint runs from the cessation of the discriminatory activity. In other words, the statute of limitations does not begin to run until the challenged act or the employment relation ends. Dudley v. Textron, Inc.,

Burkart-Randall Division, 386 F.Supp. 602 (E.D. Pa. 1975).

Courts have found allegations of continuing discrimination sufficient in many different contexts, even when the allegation is merely that the discrimination continues.

Pacific Maritime Association v. Quinn, 491 F.2d 1294 (9th Cir. 1974). In Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972) the court found continuing discrimination stated where the plaintiff had made two written applications for transfer and subsequent oral reapplication. In Rich v. Martin-Marietta Corp., 522 F.2d 333 (10th Cir. 1975), the court held that plaintiff's challenge to the promotion system was sufficient allegation of continuing violation. In Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert. den. 404 U.S. 939 (1971), the court found that a company's maintenance of a discriminatory retirement plan constituted a continuing act of discrimination. In Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969), the court found continuing discrimination properly pleaded when the complainant merely used the word "continuing" to characterize the discrimination. In Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973), the court construed the complaint as an attack on a discriminatory hiring system which continued to exist and which continued to operate to deny complainants jobs to which they claimed to be entitled. This court in Egelston v. State University College at Geneseo, Slip Opinion No. 1050, June 7, 1976, and in Noble v. University

of Rochester, Slip Opinion 1115, June 7, 1976 has underscored the concept of continuing employment discrimination.

When the Congress passed the amendments to Title VII effective in 1972, it recognized the case law which had developed around the concept of continuing employment discrimination. Congress approved this concept and the case law observing: "Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued..." Congressional Record, March 8, 1972 at 7565.

Plaintiffs have filed their claims of employment discrimination well within the 300 days of the last act of discrimination as required by Title VII. In fact, the last act of discrimination has not yet ended; plaintiffs' charges of the class-wide pattern and practice discrimination would be timely filed if filed today, tomorrow, next week or next month.

The principle of continuing discrimination applies as well to determining timeliness of claims filed pursuant to 42 U.S.C. §§1981 and 1983 and the Constitution. Dudley v. Textron, Inc., Burkart-Randall Div., 386 F.Supp. 602 (E.D. Pa. 1975). Thus, while a three year statute of limitation would be generally applicable to causes of action arising under the Constitution or the Civil Rights statutes, see Kaiser v. Cahn, 510 F. 2d 282 (2nd Cir. 1974), the claims herein are

timely filed because the last act of discrimination has yet to be discontinued.

(F) Plaintiffs Have Standing To Assert These Claims

It is difficult to fathom the lower court's dismissal of these claims on the ground that the plaintiffs lack standing to sue. All of the plaintiffs are present, past and/or prospective employees of the defendants. Title VII was specifically enacted by Congress to give these plaintiffs a specific cause of action to redress these specific claims of employment discrimination.

Not only do plaintiffs have specific standing to sue conferred by Title VII but plaintiffs meet all the general tests of standing to sue in a federal court to enforce federal rights. Plaintiffs allege that the defendants' actions cause them injury in fact and that the interests sought to be protected are within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Association of Data Processing Organizations, Inc., v. Camp, 397 U.S. 150 (1970). The plaintiffs herein allege such a personal stake in the outcome of the controversy as to assure that concreteadverseness which sharpens the presentation of issues on which the courts so largely depend for illumination of constitutional questions. Baker v. Carr, 369 U.S. 186 (1962).

Plaintiffs allege injury in fact. Plaintiffs allege that they have been denied equal terms, conditions and privileges of employment; they have been denied the pay to which they are entitled, the promotions to which they are entitled, the training to which they are entitled, the status to which they are entitled, for example, based on their education, background and experience. These injuries are within the zone of interests protected by Title VII-Title VII was enacted to protect plaintiffs from these acts. The alleged injury is within the zone of interests protected by 42 U.S.C. §§1981 and 1983, which guarantee all persons equal rights to make and enforce contracts, including employment contracts and which guarantee all persons equal protection of the laws and equal privileges and immunities, including equal employment opportunities. Similarly, the injury alleged is within the zone of interests protected by the equal protection clause of the Fourteenth Amendment.

(G) All Necessary Defendants Are Before The Court

Defendants in this action are the persons and/or entities responsible for the decisions on recruiting, hiring, transferring, promoting, evaluating, testing, training and the like of employees of the Monroe County Department of Social Services. It was a error of fact and law for the court below to have accepted the defendants' assertion that the New York State Civil Service Commission and the New York

Department of Social Services are indispensable defendants.

The New York Civil Service Law, McKinney's, Consolidated Laws of New York Annotated, Book 9, provides that there shall be a state civil service with power and authority in connection with state employees and a "municipal commission" including a personnel officer of a county with power and authority regarding recruitment and/or hiring of county employees. The personnel officer of a county has the power to administer the New York State Civil Service Law; these duties include the personnel officer of a county certifying and/or creating positions of employment, determining what shall be the qualifications for employment, administering tests for employment, establishing eligible lists for employment and the making of appointments. A county personnel officer may request expert assistance from the New York State Civil Service Commission, some without charge to him/her but the administration of the state civil service with respect to state employees is separate and independent of the administration of the county civil service with respect to county employees. (Submitted herewith as Appendix (B) are copies of the relevant sections of the New York State Civil Service Law which set forth the power and responsibility of the county personnel officer-in this case Monroe County Civil Service Commission Office of Civil Service and Personnel of Monroe County, Fred Lapple.)

In Matter of Caparoco v. Kaplan, 20 A.D. 2d 212 (4th Dept. 1964), the court held with respect to Monroe County and the Monroe County Civil Service Commission that the New York State Civil Service Law directs personnel operations of the state civil service to be separate from the personnel operations of the county civil service. (A copy of this decision is attached hereto and made a part hereof as Appendix (C).

Plaintiffs charge that the defendants have, for example, discriminatorily refused to hire persons because of race, sex and national origin, have discriminatorily classified persons, have discriminatorily transferred and promoted persons, and have manipulated the Civil Service Law so as to promote the advantage and advancement of white employees, particularly the white male employees. The Equal Employment Opportunity Commission in its finding of reasonable cause was correct in stating that the Monroe County Civil Service Commission is required by the state law, among other things, to prepare and conduct competitive examinations to prevent provisional appointments from continuing for a period in excess of nine months and to determine by means of a non-competitive examination whether a nominee for a provisional appointment is qualified. All questions of fact are in dispute and will ultimately be decided herein by the trial of this lawsuit,

but plaintiffs allege, as the EEOC found, that defendant, Department of Social Services, has, in conjunction with the defendant, Monroe County Civil Service Commission, and their respective individual agents, routinely allowed white persons to have long term provisional appointments, in violation of the law, and has made those provisional appointments to promote the advantage and advancement of white employees, without reviewing the qualifications of the white persons so appointed and without in fact appointing persons who are qualified to positions.

Defendants gave the lower court no facts on which it could conclude that New York State agencies are "indispensable" parties. Defendants needed to show that some state agency would be prejudiced by a judgment in this case or the defendants needed to show that complete relief could not be granted without the state agencies made parties. Olson v. Miller, 263 F.2d 738 (D.C. Cir. 1959). Here the named defendants have full control over the employment policies and practices of Monroe County. Complete relief can be granted to the plaintiffs in the absence of state agencies.

Even if it were true that state agencies are indispensable parties, the lawsuit should not be dismissed for this reason. Attorneys for defendants conceded at oral argument in the court below that any state agency they allege ought be made a party can be easily made a party defendant. Plaintiffs urged below

that defendants in plead any state agency they felt responsible in whole or in part for the illegal employment practices of Monroe County (A.258,259) Failure to join a party defendant is not a jurisdictional defect; opportunity should be given to join the additional defendants. Olson v. Miller, supra.

POINT II

THE COURT ERRED IN SUMMARILY DISMISSING PLAINTIFFS' CLAIMS WITHOUT ALLOWING PLAINTIFFS AN OPPORTUNITY TO PURSUE DISCOVERY.

This case, as the cases of Egelston v. State University College at Geneseo, and Noble v. University of Rochester, decided by this court June 7, 1976, are examples of the lower court's cursory dismissal without reason of employment discrimination claims, which on their face are legally sufficient. Dismissal of this case, like the dismissals in Noble and Egelston are clearly improper. Just as in Noble and Egelston, the lower court dismissed detailed pleadings of the claims of employment discrimination notwithstanding that the plaintiffs in each case had previously noticed discovery either at the time of serving the complaint or immediately after serving the complaint. Here, the lower court stayed all of plaintiffs' discovery even though plaintiffs noted that documentation of their claims of employment discrimination is in the control of the defendants and the court ought permit the discovery noticed prior to

a decision on the motions to dismiss.

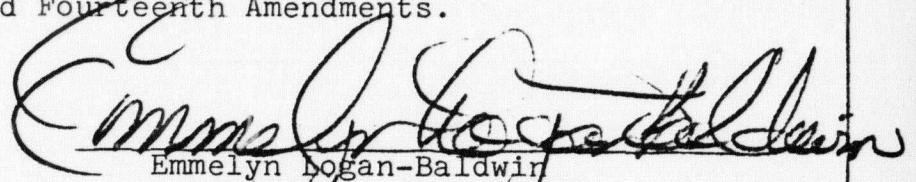
Following Noble and Egelston, this court ought reverse and remand with directions that this case ought be reassigned by the Chief Judge of the Western District of New York. The court should further direct that all discovery noticed should be completed without any further delay.

All of the requests for discovery are thoroughly discussed in plaintiffs' papers and analyzed as to relevancy. (A. 269-278) Defendants have made wholly unacceptable assertions that the discovery requested by the plaintiffs would be "burdensome" to them.

All of the discovery requests of the plaintiffs are proper in an employment discrimination case as courts time and again have underscored. Green v. McDonnel Douglas Corp. 411 U.S. 792 (1973); Brown v. Gaston Co. Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. denied 409 U.S. 982 (1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. den. 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Jackson Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972); Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); Graniteville Co., v. E.E.O.C., 438 F.2d 32 (4th Cir. 1971). Delay of expeditious prosecution of these claims should not be tolerated any longer.

CONCLUSION

For the foregoing reasons, plaintiffs request that the court reverse the decision of the lower court finding that plaintiffs' complaint states claims against all defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§1981, 1983, the United States Constitution, the First, Ninth and Fourteenth Amendments.



Emmelyn Logan-Baldwin
Attorney for Plaintiffs-Appellants
Office and P.O. Address:
510 Powers Building
Rochester, New York 14614
Telephone: 716-232-2292

August 12, 1976

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiffs-Appellants was served on the defendants by my causing two copies thereof to be mailed to each attorney for the defendants, Joseph Pilato, Esq., Monroe County Office Building, Rochester, New York and Frank Celona, Esq., Monroe County Department of Social Services, 111 Westfall Road, Rochester, New York, this 13th day of August, 1976.



Emmelyn Logan-Baldwin
Attorney for Plaintiffs-Appellants
Office and P.O. Address:
510 Powers Building
Rochester, New York 14614
Telephone: 716-232-2292

August 13, 1976
Rochester, New York

APPENDIX A

BEST COPY AVAILABLE

SECTION 208--CONTINUING VIOLATION

Contents

- 1--Introduction - Policy/Policy-Application Distinction
- 2--Traditional or Past Practices as Evidence of Existence of Current Policy
- 3--Specific Situations Held to Constitute Continuing Violations
 - a. Promotion
 - b. Transfer
 - c. Layoff and Recall
 - d. Pension Plans
 - e. Hiring and Union Membership
- 4--Continuing Violations - Mootness

[¶ 4101]

208.1 Introduction - Policy/Policy-Application Distinction

A Charging Party may attack a current employment policy, in addition to past applications of that policy; and, since a policy is by nature continuing, a "policy" charge always is timely filed (See IM 204-Timeliness). Thus the Commission's jurisdiction vests when it receives a charge which merely alleges the current existence of an unlawful policy. The Commission's jurisdiction does not await proof that the alleged policy exists in fact, or has been applied within 180 (or 300) days of the filing date. These are facts relevant to the merits of the charge, rather than to the Commission's jurisdiction to investigate it.

Charges which do not specifically include the word "policy", or otherwise suggest a continuing course of conduct, normally may be read, in context, to allege a continuing, i.e., policy-type, violation. The purpose of this Section is to alert the reader to the policy/policy-application distinction and the "continuing violation" approach to seemingly untimely charges.

[¶ 4102]

208.2 Traditional or Past Practices as Evidence of Existence of Current Policy

Whether an allegedly continuing practice, i.e., a present policy, exists is, as noted above, a question of fact. Charging Party has the burden of proceeding on whether an alleged policy in fact was extant during the 180 or 300-day period preceding the filing of the charge and/or thereafter. Barring admissions from Respondent, Charging Party must evidence sufficient specific acts (hiring acts, promotion

acts, etc.) from which an underlying policy (discriminatory hiring policy, promotion policy, etc.) reasonably may be inferred. Those specific acts need not have occurred during the 180 or 300-day period; it is enough that they occurred over a period of time directly preceding the 180 or 300-day period. The Commission and the courts will infer, absent other facts, that the thus inferred policy carried over into, and in fact existed during, the 180 or 300-day period. U.S. v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), 2 EPD 10,083; CD 70-396, CCH 6101; CD 71-1101, CCH 6198. See also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969), 2 EPD 9988 and Tooles v. Kellogg Company, 336 F.Supp. 142 (D. Neb. 1972) 4 EPD 7661. In Tooles, the court stated:

"This Court adopts what it finds the better view that where the discrimination has been of a continuing nature, as herein alleged, evidence of prior acts against plaintiff must be allowed, to show the continuing pattern of discrimination which has occurred and continued to occur within the 210 day limit preceding the date the complaint was brought."

[¶ 4103]

208.3 Specific Situations Held to Constitute Continuing Allegations

(a) PROMOTION

Where an individual is denied a promotion, but the reasons for such denial would continue to frustrate his future efforts to attain a similar position (e.g., lack of high school education; lack of departmental seniority; failure to pass test, etc.) the failure to promote the individual may be deemed to constitute a continuing policy. See CD 71-1151, CCH 6208. Accord: Mack v. General Electric Co., 329 F.Supp. 72 (E.D. Pa. 1971), 3 EPD 8272 at n.6. "In addition, we think a denial of upgrading operates to discriminate against an employee at least until he is upgraded as he deserves and we thus regard a discriminatory failure to upgrade as a continuing violation of Title VII." Likewise, in Jamison v. Olga Coal Co., ___ F.Supp. ___ (D.W. Va. 1971), 4 EPD 7787, the court ruled that an allegation of discriminatory promotions was continuing as to general policies and as to the failure of unions to redress the situation even though a specific act complained of by Charging Party occurred more than 90 days prior to filing of the charge and, indeed, before the effective date of Title VII:

... the charge before the EEOC involved two separate areas of discrimination, one general

[¶ 4103] § 208.3

Commerce Clearing House, Inc.

and one specific. While it is true that the specific (charge of discrimination with respect to the promotion...) relates to conduct on the parts of defendants prior to the effective date of Title VII and to an incident occurring more than 90 days before the filing of the charge, nevertheless the general charge of a denial of promotions to Negroes to better jobs and the failure on the part of the defendant unions to seek redress of such discrimination is not confined to the same time.

Accord, Tooles v. Kellogg, *supra*. But see, Jennings v. Illinois Central R.R. Co., F.Supp. (W.D. Tenn 1970), 3 EPD 8012, aff'd per curiam, F.2d (6th Cir. 1971), 3 EPD 8275.

(b) TRANSFERS

The same theory applies to requests for transfers as to promotions. In Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972), 4 EPD 7751, the lower court held that oral reapplications for transfer would not make a prior rejection timely by establishing a continuing violation. HELD: reversed.

"We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act. . . . there is no need to lock the courthouse door to his claim solely because he has alleged a contemporaneous course of conduct as an act of discrimination." (But see, Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195 (W.D. Va. 1969), 2 EPD 10,059.)

(c) LAYOFF AND RECALL

Cox v. U.S. Gypsum, *supra*:

While layoff may be a single act, the failure to recall constitutes a continuing violation. In so concluding we consider the following facts:

208.4 Continuing Violations - Mootness

Individual relief for Charging Party, or mootness of a specific application of a continuing policy, does not bar adjudication of the lawfulness of the policy itself. In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), 3 EPD 8247, the exact position sought by plaintiff was abolished during the pendency of the court action. Respondent sought to have the case dismissed for mootness. In approving denial of this motion the court reasoned that:

Similarly here, the burden which Southern Pacific's general labor policy and the state statutes in question place on Southern Pacific's employment of women remains and controls the company's future work assignments. Moreover, the fact that this cause arose under Title VII of the Civil Rights Act of 1964 provides additional support for the view that the action has not been mooted by the closing of the Thermal agency. That Title is so designed that, in the attainment of its objectives, the administrative agency primarily renders a conciliation service. The ultimate sanction is judicial enforcement initiated by individuals who are aggrieved.

Section 706(e) of the Act, 42 U.S.C. §2000e-5(e). In many such cases, including this one, declaratory and injunctive relief is sought, the need for which is not necessarily dependent upon proof that a particular discrimination has continued.

Thus, while the resulting litigation is private in form, it is intended to effectuate the policies of the legislation. So considered, such a suit constitutes more than the assertion of a private claim and, consequently, it is not necessarily defeated by the disappearance of the particular grievance which gave rise to the action. The controverted issue of unlawful employer discrimination remains; it may, and should be, judicially resolved and relief granted or denied. See Jenkins v. United Gas Corp., 400 F.2d 28, 30-33, (5th Cir. 1968), 1 EPD 9908.

The discontinuance of the particular grievance which gave rise to this action may call for a denial of some of the relief requested. See Parham v. Southwestern Bell Tel. Co., 3 EPD 8021 433 F.2d 421, 429 (8th Cir. 1970). It does not moot the litigation.

[Section 209 begins on page 3651.]

(1) A layoff, as distinguished from discharge or quitting, suggests a possibility of re-employment. (2) A layman's claim of "continuing" discrimination, after a discriminatory layoff, readily suggests that he claims there has been subsequent recall or new hiring which discriminates against him. (3) The record shows that the company had bound itself, by its collective bargaining agreement, to consider seniority in making a recall, and the agreement provides that an employee does not lose seniority by reason of layoff until one year has expired. (4) The Commission chose to accept these charges as timely. (5) The company received notices of other charges of similar current discrimination at or about the same time.

(d) PENSION PLANS

Leading case is Mixson v. Southern Bell Telephone and Tele. Co., 334 F.Supp 525 (N.D. Ga. 1971), 4 EPD 7606 and the companion Commission Decision, CD 71-1413, CCH 6225. The court concludes that Respondent's failure to pay widow death benefits is an allegation of a continuing violation. But see McCarty v. Boeing Company, 321 F.Supp 1100 (W.D. Wash. 1970), 3 EPD 8056.

(e) HIRING AND ADMISSION TO UNION

Watson v. Limbach Corp., ___ F.Supp. ___ (S.D. Ohio 1971), 4 EPD 7648. Charging Party applied for a job with Respondent Employer and membership in Respondent Union:

"It is the opinion of the court that since the complaint before us clearly alleges an ongoing pattern of discrimination against plaintiff and his class, it is not necessary that plaintiff be in strict compliance with §2000e-5d...[A] complaint...may not be dismissed on the grounds that it was untimely filed where the suit challenges the maintenance of an alleged discriminatory system rather than one isolated instance..."

Accord: EEOC v. Local 189, Plumbers and Pipefitters, 311 F.Supp. 464 (S.D. Ohio 1970), 2 EPD 10,181; Dobbins v. Local 212, IBEW, 292 F.Supp. 413 (S.D. Ohio 1968). For the proposition that a hiring policy may constitute a continuing violation, see also CD 72-1702, CCH 6361.

APPENDIX B

§ 1

Note 6

One of objects of this chapter is to enable all persons who possess appropriate preliminary qualifications, as matter of right, to take examinations for position in service, conducted under law, subject to minor and reasonable conditions. *Kearns v. City of Buffalo*, 1932, 111 N.Y.S.2d 778.

This chapter has as its underlying principle the desire to afford everyone who has the necessary qualifications an equal opportunity of securing appointment, and the principles of civil service must be carefully observed. *Mendelson v. Finegan*, 1938, 168 Misc. 102, 5 N.Y.S.2d 873, affirmed 253 App.Div. 709, 1 N.Y.S.2d 648, affirmed 278 N.Y. 568, 16 N.E.2d 106. See, also, *In re Sheridan*, 1938, 253 Misc. 358, 2 N.Y.S.2d 183.

7. Law governing

Where inconsistency exists between civil service rule and statute, the rule must yield to statute. *Goss v. Rice*, 1936, 160 Misc. 698, 200 N.Y.S. 440, affirmed 249 App.Div. 895, 202 N.Y.S. 729.

8. Generally

Although this chapter by its terms, relates generally to all appointments and promotions in the civil service of the state, or of any civil division thereof, its provisions apply only to those who are engaged exclusively in the public service, and do not extend to all public officers, who, as to all or a part of their duties, are engaged in the service of a superior officer. *Flaherty v. Milliken*, 1908, 103 N.Y. 564, 80 N.E. 558.

This chapter constitutes a general system of statute law applicable to

CIVIL SERVICE LAW

appointments and promotions in every department of the civil service of the state, with such exceptions as are specified in the statute. *People v. Roberts*, 1891, 111 N.Y. 42, 12 N.E. 1032. See, also, 280 Op. Atty.Gen. 408.

The fact that the term of office is indefinite does not exempt it from the provisions of this chapter. *Letter of Phillips*, 1910, 120 Misc. 365, 124 N.Y.S. 60, affirmed 247 N.Y. 521, 93 N.E. 1120.

9. Legislative bodies

The general laws relating to civil service have no application to legislative bodies. *Shaughnessy v. Peacock*, 1902, 172 N.Y. 323, 65 N.E. 104.

10. City of New York

This chapter applies to the city of New York, except as limited or compensated by the provisions of this chapter. *People v. Kearns*, 1931, 166 N.Y. 64, 58 N.E. 14. See, also, *People v. Dalton*, 1899, 158 N.Y. 174, 21 N.E. 1113; *People v. Fetherston*, 1911, 27 App.Div. 410, 153 N.Y. 223; 27 Op. Atty.Gen. 287.

11. Counties and towns

The civil service statutes originally were limited to the state and its cities, but the constitution extends the civil service to all the civil divisions of the state, including villages. The counties and towns are the civil divisions of the state, and are, therefore, with villages, now included in the civil service. *Chittenden v. Wurts*, 1897, 152 N.Y. 345, 40 N.E. 557.

§ 2. Definitions BEST COPY AVAILABLE

When used in this chapter.

1. The term "commission" or "state commission" means the state civil service commission;

2. The term "president" means the president of the state civil service commission;

SHORT TITLE; DEFINITIONS

§ 2

3. The term "department" or "civil service department" means the state department of civil service, unless otherwise expressly stated or unless the context requires a different meaning.

4. The term "municipal commission" or "municipal civil service commission" means the civil service commission of a city, of a county, or of a suburban town governed pursuant to article three-A of the town law and having a population of at least 5,000 thousand as shown in the most recent decennial federal census or special population census taken pursuant to section 200-a of the general municipal law, or the personnel officer of a city, of a county, or of such a suburban town, or a regional civil service commission or a regional personnel officer, as the case may be, unless otherwise expressly stated or unless the context requires a different meaning;

5. The "civil service" of the state of New York or any of its subdivisions includes all offices and positions in the service of the state or of such civil divisions, except such offices and positions in the militia and the military departments as are or may be created under the provisions of article twelve of the constitution;

6. The "state service" shall include all offices and positions in the civil service of the state;

7. The "city service" shall include all offices and positions in the civil service of any city;

8. The "service of a civil division" shall include all offices and positions in the civil service of any subdivision of the state; and the term "civil division" shall include within its meaning a city;

9. The term "appointing authority" or "appointing officer" means the officer, commission or body having the power of appointment to subordinate positions;

10. The term "jurisdictional classification" means the assignment of positions in the classified service to the competitive, non-competitive, exempt or labor classes;

11. The term "position classification" means a grouping together, under common and descriptive titles, of positions that are substantially similar in the essential character and scope of their duties and responsibilities and in the qualification required therefor;

§ 2

Note 1

CIVIL SERVICE LAW

Art. 1

12. The term "board of supervisors" shall include within its meaning the elective governing body of a county which has no board of supervisors.

L.1958, c. 790, § 1; amended L.1969, c. 887, § 1; L.1972, c. 70, § 1.

Historical Note

1972 Amendment. Subd. 4. L.1972, c. 70, eff. Jan. 1, 1973, substituted "fifty thousand" for "two hundred thousand."

1969 Amendment. Subd. 4. L.1969, c. 887, § 1, eff. Jan. 1, 1970, included civil service commission or personnel officer of suburban town governed by Town Law Art. 3-A and with a minimum population of 200,000.

Derivation. Subd. 1. Civil Service Law of 1900, c. 15, § 2, subd. 1, which was repealed by L.1958, c. 790, § 1.

Subd. 4. Civil Service Law of 1900, c. 15, § 2, subd. 2; as amended by L.1941, c. 885, § 2; and repealed by L.1958, c. 790, § 1.

Subd. 5. Civil Service Law of 1900, c. 15, § 2, subd. 3; as amended by L.1947, c. 329, and repealed by L.1958, c. 790, § 1.

Cross References

Additional definitions, see section 1.2 of Rules for the Classified Service.

Library References

Municipal Corporations C-210(1).
Officers C-11.

C.J.S. Municipal Corporations § 711 et seq.
C.J.S. Officers § 34.

Notes of Decisions**I. Civil service—Generally**

Unincorporated association consisting of persons who had become eligible for appointment as social investigators through civil service examination were not entitled to mandamus directing city commissioner of public welfare to desist from using as social investigators persons unemployed or whose employment was inadequate to provide necessities of life, and who had neither passed nor been exempted from civil service examination since social investigators were appointed under Emergency Relief Act of New York which provided that persons employed under act should be subject to civil service, and had received no appointment to any office in civil service of state as contemplated by Const. Art. 5, § 6. Social Investigators Eligibles Ass'n v. Taylor, 1935, 268 N.Y. 233, 107 N.E. 2d.

City service 7
Civil divisions

Generally 8
Counties 9

Civil service

Generally 1

County employees 2

Military positions 3

Public benefit corporations 4

State service

Generally 5

County employees 6

Art. 1**SHORT TITLE; DEFINITIONS****§ 2**

Note 3

from the public funds, is within the civil service of the state, provided the service is not a military one. Id.

Whether a position is in the civil service is to be determined primarily by the same principles of law which determine whether or not the relation of master and servant exists in private employment, and therefore, the question is largely determined by whether or not the power of appointment and removal is resident in a public officer, and whether or not the salary or compensation of the position is paid out of the public funds. Id.

Employees of the Children's Aid Society of Rochester are not in the civil service of Monroe county or of the state. 1906, Op.Atty.Gen. 480.

2. — County employees

The State Civil Service Commission, upon merger of the police departments of the villages of East Rockaway and Island Park with the county police department, lost jurisdiction over the officers involved so long as the merger continued and the Nassau County Civil Service Commission acquired jurisdiction and the right to certify the rank of the officers transferred to the board of supervisors. In re Schaefer, 1940, 238 App.Div. 1003, 16 N.Y.S.2d 772, reargument denied 239 App.Div. 772, 18 N.Y.S.2d 749.

Employees of Niagara Frontier Commission are not in the civil service. 1939, Op.Atty.Gen. 223.

The position of law librarian in the fifty judicial district, located in the city of Utica, is in the civil service of the state. 1913, Op.Atty.Gen. 217.

Employees of the Palisades Interstate Park Commission are within the civil service of the state, although such commission is an interstate body through comity with the state of New Jersey. 1913, Op.Atty.Gen. 137.

Any person who is employed by the state or a civil division thereof, or by an governmental board or agency, and who receives compensation

9

3. — Military positions

Not only does the title of this chapter distinctly indicate, but the

of this section and deleted references to special or administrative fund in two instances.

Subd. 4. L1968, c. 200, § 4, eff. May 21, 1968, substituted "source specified in subdivision two of this section, and shall certify such amount to the appropriate department or agency of the state or public authority" for "special or administrative fund or public authority"; in sentence beginning "Such sums," inserted "at the beginning of the fiscal year following such certification.;" and omitted requirement of presidential estimate of expenses to be charged to each special or administrative fund or public authority.

Repeal of Former Subd. 4 as appended to L1968, c. 200, provides "Subdivision 2 of Section 11 [the section] of the Civil Service Law, repealed by § 2 of this bill, provides for payment of a fractional share of expenses of administration of a Civil Service Department by special or administrative funds and by public authorities. These repealed provisions are re-enacted in substance in the new, substituted subdivision which includes additional provisions for payment of a fractional share from appropriations assessed or not collected or refunded pursuant to law (i. e., first instance appropriations).

TITLE B—ORGANIZATION AND FUNCTIONS OF MUNICIPAL CIVIL SERVICE COMMISSIONS

Sec.

15. Optional forms of local civil service administration.
16. Change of form of administration.
17. Jurisdiction.
18. Administration of civil service in jointly established agencies.
19. Election by certain villages, school districts, special districts and public agencies located in two or more counties.
20. Rules.
21. Investigations.
22. Certification for new positions.
23. Services by state department of civil service; certification of state and municipal eligible lists.
24. Removal of municipal civil service commissioners and personnel officers.
25. Powers of state civil service commission with respect to local rules; appointments and eligible lists.
26. Reports; inspections.
27. Prohibition against certain public employment and political activities.

§ 15. Optional forms of local civil service administration

1. Optional forms of administration. There shall be the following forms of local civil service administration for the purpose of administering the provisions of this chapter in counties including civil divisions therein, in certain suburban towns, and in cities in the state:

(a) Municipal civil service commissions. A municipal civil service commission shall consist of three persons, not more than

any of whom shall at any time be adherents of the same political party. The members of a county civil service commission shall be appointed by the board of supervisors, except that in a county having a county executive the members of the commission shall be appointed by the county executive with the advice and consent of the board of supervisors. The members of a suburban town civil service commission in such a town described in subdivision four of section two of this chapter shall be appointed by the town board of such town. The members of a city civil service commission shall be appointed by the mayor, city manager, or other authority, as the case may be, having the general power of appointment of city officers and employees. Of the members first appointed upon the establishment or re-establishment of a municipal civil service commission, the term of one shall expire on May thirty-first of the first even-numbered year following the date of appointment; the term of one shall expire on May thirty-first of the second even-numbered year following the date of appointment; and the term of one shall expire on May thirty-first of the third even-numbered year following the date of appointment. Upon the expiration of each of such terms, the term of office of each commissioner thereafter appointed shall be six years from the first day of June in the year in which the term of his predecessor expired. If the office of any such commissioner shall become vacant by death, resignation or otherwise, his successor shall be appointed as herein provided for the unexpired term.

(b) Personnel officers. The personnel officer of a county shall be appointed by the board of supervisors or, in a county having a county executive, by the county executive with the advice and consent of the board of supervisors. The personnel officer of a suburban town described in subdivision four of section two of this chapter shall be appointed by the town board of such town. The personnel officer of a city shall be appointed by the mayor, city manager, or other authority, as the case may be, having the general power of appointment of city officers and employees. The term of office of a personnel officer shall be six years. A personnel officer shall have all the powers and duties of a municipal civil service commission.

(c) Repealed.

(d) Administration by regional civil service commission or regional personnel officer. Any two or more adjoining counties or any two or more cities in the same or adjoining counties,

shall become effective upon the dissolution of such regional service commission or office of regional personnel officer, on the dissolution of a regional civil service commission, the office of regional personnel officer, the provisions of this chapter shall be administered in any city or county participating therein which has not so elected to adopt one of the other forms of civil service administration provided in section fifteen, in the form of civil service administration in effect in such county immediately preceding its election to come under the jurisdiction of such regional civil service commission or regional personnel officer.

(e) A suburban town as described in subdivision four of section two of this chapter, electing to initiate its own civil service administration for the first time may appoint its administrator immediately upon making an election pursuant to section one (b)¹ and such administration shall assume jurisdiction upon transfer of eligible lists, records, documents and files to it. The transfer shall be completed within six months of the appointment of the administration hereunder.

3. Notice and public hearing. A public hearing shall be held after reasonable notice, before any action may be taken by the governing board or body of a city or suburban town, as specified above or county to elect a change of form of civil service administration for such city or suburban town, as specified above, or county, as the case may be, or to revoke such election or postpone the effective date of such election.

L.1958, c. 790, § 1; amended L.1967, c. 205, § 1; L.1969, c. 887, §§ 1-6; L.1970, c. 24, §§ 1, 2.

¹ So in original. Probably should read "section sixteen 1(b)."

Historical Note

1970 Amendment. Subd. 1. L.1970, c. 24, § 1, eff. Feb 24, 1970, added sentences beginning "Such election" and "This section."

Subd. 2, par. (c). L.1970, c. 24, § 2, eff. Feb 24, 1970, added par. (c).

1969 Amendment. Subd. 2, par. (a). L.1969, c. 887, § 5, eff. Jan. 1, 1970, in sentence beginning "Except as herein", inserted "or suburban town described in subdivision four of section two of this chapter."

Subd. 2, par. (c). L.1969, c. 887, § 5, eff. Jan. 1, 1970, authorized subd.

Subd. 1. L.1969, c. 15, § 11-a, which was repealed by L.1967, c. 790, § 1. Said subd. 3 was added by L.1941, c. 885, § 1. Subd. 3 was added by L.1941, c. 885, § 1, and repealed by L.1958, c. 790, § 1.

Notes of Decisions

1. Subdivision

A change by a city from Civil Service Commission to personnel officer is made by a local law subject to a mandatory referendum. 1970, Op. Atty.Gen. (Inf.) 171.

§ 17. Jurisdiction

1. County civil service commission or personnel officer. The county civil service commission or personnel officer of a county shall administer the provisions of this chapter with respect to the offices and employments in the classified service of such county and the civil divisions therein, including school districts, except those which are operating under one of the optional forms of civil service administration provided in section fifteen of this chapter and the city school districts of such cities.

2. City or suburban town civil service commission or personnel officer. Except as otherwise provided by special law enacted by the legislature, the civil service commission or personnel officer of a city or suburban town described in subdivision four of section two of this chapter shall administer the provisions of this chapter with respect to the offices and employments in the classified service of such suburban town or city, including the city school districts of such city.

3. Regional civil service commission or regional personnel officer. A regional civil service commission or regional personnel officer shall administer the provisions of this chapter with respect to the offices and employments which would otherwise be subject to the jurisdiction of the civil service commissions or personnel officers of the respective counties and cities under the jurisdiction of such regional civil service commission or regional personnel officer.

4. Each municipal commission and personnel officer shall have power at its own expense to conduct examinations and establish eligible lists for any position within its jurisdiction.

L.1958, c. 790, § 1; amended L.1960, c. 1016, § 1; L.1969, c. 887,

§ 19. Election by certain villages, school districts, districts and public agencies located in two or more counties

The administration of this chapter in a village, school district or special district incorporated or established on or after the effective date of this act¹ and comprising territory in two or more counties, or in a public agency established on or after the effective date of this amendment and maintained jointly by two or more counties or two or more municipal corporations or other civil divisions, including school districts, situated in different counties, shall be under the jurisdiction of the civil service commission or personnel officer having jurisdiction over the classified service of one of such counties selected by action of the governing board or body of such village, school district or special district, or the appointing authority of such public agency. In the event that such board or body of such a newly incorporated village or newly established school district or special district fails to make such selection within ninety days after the effective date of such incorporation or establishment, such village, school district, special district or public agency shall be subject to the jurisdiction of the civil service commission or personnel officer having jurisdiction over the classified service of a county in which the greater or greatest territorial area of such village, school district, special district or public agency is located.

L.1958, c. 790, § 1; amended L.1960, c. 1016, § 3; L.1968, c. 503, § 2, April 1, 1969.

Historical Note

1968 Amendment. L.1968, c. 503, § 2, eff. June 5, 1968, in sentence beginning "The administration of" inserted "or in a public agency established on or after the effective date of this amendment and maintained jointly by two or more counties or two or more municipal corporations on other civil divisions, including school districts, situated in different counties" and inserted references to public agencies in catchline and wherever appearing in section.

1960 Amendment. L.1960, c. 1016, § 3, eff. July 1, 1960, in catchline inserted "certain" and "school districts"; in sentence beginning "administration", inserted "school district" in two instances; in sentence beginning "In the event", inserted "school district" in three instances.

Derivation. Civil Service Law, 1900, c. 15, § 11-a, subd. 3, 2007-8; L.1941, c. 883, § 1, and retitle; L.1958, c. 790, § 1.

Library References

Municipal Corporations 120.

C.J.S. Municipal Corporations 472, 473.

Notes of Decisions

Board of Ethics
In *Board of Ethics v. State of New York*, were not "special districts" within the meaning of sub-division 5 of former section 11-a. 1944, Op. Atty. Gen. 204.

Rules

1. Scope of rules. Each municipal civil service commission shall prescribe, amend and enforce suitable rules for carrying out the provisions of this chapter and of section six of article 11-a of the constitution of the state of New York, including the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the classification of such offices and employments, for examinations therefor and for appointments, promotions, transfers, resignations and reinstatements therein, all in accordance with the provisions of this chapter. Nothing in this chapter or any other law shall be construed to require that positions in the executive class be specifically named or listed in such rules, or the salary grade to which a position in any jurisdictional class be allocated be specified in such rules.

2. Procedure for adoption of rules. Such rules, and any modifications thereof, shall be adopted only after a public hearing, notice of which has been published for not less than three months, setting forth either a summary of the subject matter of the proposed rules or modifications or a statement of the purpose thereof. Notwithstanding the provisions of this subdivision, however, notice and public hearing shall not be required for the adoption or modification of a rule which is required by reason of a change in any statute in order to conform the rule to the statute. The rules and any modifications thereof adopted by a county civil service commission or county personnel officer or by a regional civil service commission or regional personnel officer shall be valid and take effect only upon approval of the state civil service commission. The rules and any modifications so adopted by a city civil service commission or city personnel officer shall be valid and take effect only upon approval of the mayor or a deputy mayor designated in writing by the mayor, such designation to be filed in the offices of the state civil service commission, and the municipal civil service commission, manager or other authority, as the case may be, having general power of appointment of city officers and employees, or the state civil service commission; provided, however, that

CIVIL SERVICE LAW

where the mayor, or deputy mayor or city manager, or other authority, as the case may be, fails to approve or disapprove or modification thereof within thirty days after the same has been submitted to him, such rule or modification thereof shall be deemed to be approved by him. The rules and any modification thereof adopted by a suburban town civil service commission of such a town described in subdivision four of section two of this chapter or personnel officer of such a suburban town shall be valid and take effect only upon approval of the state civil service commission. Notwithstanding any other provision of this chapter, when a resolution of a municipal commission submits the state commission for approval includes a provision proper classification of a position in the exempt class, the state commission, if it determines that such position should properly be classified in the non-competitive class, may amend such provision, with the consent of the municipal commission, to classify such position in the non-competitive class and approve such resolution as so amended. Any such rule or modification shall be filed with the secretary of state within thirty days of final approval thereof by the state civil service commission. Such rules shall have the force and effect of law.

3. State civil service commission to promulgate rules. Upon the establishment of a municipal or regional civil service commission, or the office of municipal or regional personnel officer, it shall be the duty of such commission or personnel officer upon appointment, to adopt and procure the approval of the rules herein provided for, and, upon failure to do so within six days after appointment, the state civil service commission shall forthwith make such rules.

L.1958, c. 790, § 1; amended L.1960, c. 73, § 1; L.1961, c. 411, § 1; L.1969, c. 5, § 1; L.1969, c. 887, § 8.

Historical Note

1969 Amendments. Subd. 2. L. 1960, c. 887, § 8, eff. Jan. 1, 1970, without incorporating changes made by L.1969, c. 5, added sentence beginning "The rules and any modifications therof adopted by a suburban town".

L.1960, c. 5, § 1, eff. Feb. 25, 1960, added provisions relating to a deputy mayor.

1961 Amendment. Subd. 2. L.1961, c. 411, § 1, eff. Apr. 11, 1961, inserted

sentence beginning "Notwithstanding any other provision."

1960 Amendment. Subd. 1. L.1960, c. 73, § 1, eff. Feb. 23, 1960, added sentence beginning "Nothing in this chapter."

Derivation. Subd. 1. Civil Service Law of 1909, c. 15, § 11, subd. 1, amended by L.1958, c. 440, and renumbered by L.1923, c. 177, and repealed by L.1958, c. 790, § 1. Subd. 1 derived from Civil Service

CIVIL SERVICE ADM'NISTRATION

Note 2

c. 790, § 1. For derivation of former section 11 see note under subd. 1.

Subd. 3. Civil Service Law of 1909, c. 15, § 11, subd. 4, as so numbered by L.1923, c. 177, and amended by L.1944, c. 200, and repealed by L.1958, c. 790, § 1. For derivation of former section 11, see note under subd. 1.

Cross References

Scope and powers of State Civil Service Commission, see section 6. Powers of cities to create municipal civil service and make rules for appointments and classification of offices, see General City Law § 20(18).

Library References

Municipal Corporations § 139, 158, C.J.S. Municipal Corporations §§ 488, 518, 711 et seq., 737, 738. C.J.S. Officers § 34.

Notes of Decisions

Amendment, modification, or suspension 6
Approval of rules 2
Authority for appointments 13
Classification of positions 14
Enforcement of rules 5
Duties of appointees 15
Educational requirements 8
Effective date of rules 3
Procedure 19
Scope and effect of rules 6
Standards as disqualification 12
Standards of candidate 10
Standards on rule making power 1
Duties of candidates 9
Disqualification 17
Qualifications of candidates
Generally 7
Educational requirements 8
Standards of candidate 11
Standards of employees 18
Procedure 20
Duties of appointees 16

Municipal Civil Service Commission to pass reasonable rules and regulations may not be exercised by promulgation of rules and regulations inconsistent with this chapter. Kearns v. City of Buffalo, 1952, 111 N.Y.S.2d 778.

Under this chapter, the discretionary power of Municipal Civil Service Commission to make rules concerning civil service examinations cannot be carried so far as to defeat purposes of genuine competitive civil service. Ryan v. Finegan, 1938, 166 Misc. 548, 2 N.Y.S.2d 10, affirmed 253 App.Div. 713, 1 N.Y.S.2d 643.

2. Approval of rules

Under provision of subdivision 2 of former section 11 that Municipal Civil Service Commission rules and regulations, and modification thereof shall be valid and take effect only upon approval of mayor and of the State Civil Service Commission, approval of mayor and State Civil Service Commission could not be given in advance of actual establishment by Municipal Civil Service Commission of such rules and regulations. Corrigan v. Joseph, 1952, 303 N.Y. 172, 106 N.E.2d 593, motion denied 304 N.Y. 730, 108 N.E.2d 618, certiorari denied 73 S.Ct. 783, 345 U.S. 924, 97 L.Ed.2d 1350.

The municipal civil service commissioners of the city of Buffalo have power to adopt a rule that, as a condition of eligibility to enter a promotional examination in the police department, the person desiring promotion must have been continuously employed for the specified period of twelve months immediately preceding such examination in a next lower position, the duties of which are such as would naturally and properly tend to fit him for the duties of the position to which he seeks promotion, and such rule is not contrary to a rule adopted by the common council providing that vacancies in the positions of captains and lieutenants shall be filled by appointment of a member of the force, for such rule does not mean that all members of the force are entitled to take the examination, but only such as are permitted to do so under reasonable rules promulgated by the civil service commission. *People v. Feldman*, 1917, 179 App.Div. 293, 166 N.Y.S. 375, affirmed 221 N.Y. 656, 117 N.E. 1081.

County civil service commission rule that in no case shall any person be eligible to take promotional examination until one year from date of permanent appointment to last position did not preclude commission from requiring greater length of prior service for entrance to promotional examinations. *Nelson v. Jennings*, 1961, 214 N.Y.S.2d 21.

18. Reinstate of employees

Under the power conferred by former section 11 on Municipal Civil Service Commissioners to make rules, a rule of the commission providing that a person permanently appointed to a position in the competitive class who has been appointed to a position in the exempt class may be restored to the position originally held by him is valid, and neither the purpose of

this chapter nor the language of former section 11 was contravened by the rule permitting reinstatement of an employee, without further examination or new proof of fitness, in an office for which his fitness had already been demonstrated. *Siklich v. Lahey*, 1920, 243 N.Y. 102, 120 N.E. 600.

19. Evidence

The civil service regulations of a city, on file in the office of the Civil Service Commission at Albany, may be sufficiently proved for use as evidence by the production of the same, certified by the secretary of the commission in substantial accordance with section 933 of the Civil Procedure, now CPLR. *People v. Tobey*, 1897, 153 N.Y. 47 N.E. 800.

20. Review

Where status of discharged employee was the same as it would have been if challenged rules of a state civil service commission or their counterpart in municipal civil service rules had never been promulgated, validity of the rules would be passed upon. *Siklich v. Hegeman*, 1949, 274 App.Div. 675, 87 N.Y.S. 195.

The Courts have power to review municipal civil service rules and to declare them invalid if they are not in harmony with the civil service provisions of the constitution and laws made thereunder. *Matter of Ricketts*, 1906, 111 App.Div. 62, 8 N.Y.S. 502.

Courts cannot encroach on the field of duty of municipal public officials who are charged with responsibility of fixing salaries for civil service employees. *Sippell v. Dowd*, 1941, 101 Misc. 558, 76 N.Y.S.2d 410, affirmed 274 App.Div. 1027, 80 N.Y.S. 478.

§ 21. Investigations

A municipal commission, a municipal personnel officer, a regional commission or a regional personnel officer, for the purpose of investigating the enforcement and effect of the provi-

site of this chapter and the rules established thereunder in the county under the jurisdiction of such commission or personnel officer shall have the same powers which are granted to the state civil service commission by the third and fourth subdivisions of section six of this chapter.

§ 22. c. 720, § 1.

Historical Note

Amend. Civil Service Law of 1923, c. 177, and repealed by L. 1938, c. 12, § 11, subd. 5, added by L. 1938, c. 700, § 1.

Municipal Corporations c. 100. C.J.S. Municipal Corporations § 544.

§ 22. Certification for new positions

Before any new position in the service of a civil division shall be created, the proposal therefor, including a statement of the duties of the position, shall be referred to the municipal commission having jurisdiction and such commission shall furnish a certificate stating the appropriate civil service title for the proposed position. Any such new position shall be created only after the title approved and certified by the commission.

§ 22. c. 720, § 1.

Historical Note

Amend. Civil Service Law of 1923, c. 177, and repealed by L. 1938, c. 12, § 11, subd. 8-a, added by L. 1938, c. 700, § 1.

Municipal Corporations c. 217(3). C.J.S. Municipal Corporations § 708 et seq.

Notes of Decisions

Construction 1
Title of position 2

3. Construction

This section must be strictly construed. *People v. Dalton*, 1900, 49 Prec. 71, 63 N.Y.S. 238, affirmed 1901, 51 N.Y. 1121.

4. Title of position

A municipal civil service position may be created and appointments

made to it notwithstanding the title is not enumerated in the civil service classification schedules. *Carr v. Kern*, 1938, 279 N.Y. 42, 17 N.E.2d 762.

A person occupying the position of detective on a city police force may not be paid as such where neither the city civil service commission nor the state department of civil service has authorized or recognized such rank. 24 Op.State Compt. 139, 1968.

§ 23. Services by state department of civil service; certification of state and municipal eligible lists

1. Classification services. The state civil service department shall, without charge, upon the request of any municipal commission, render service or technical advice and assistance relative to the position classification of offices and employments under the jurisdiction of such municipal commission; provided however, that where, in the judgment of the president, the services requested would involve considerable expense to the state civil service department may render such services pursuant to an agreement for payment to the state of such compensation for such services as may be agreed upon. All money received for such services shall be paid into the state treasury in the manner provided by law.

2. Examination services. The state civil service department without charge, upon the request of any such municipal commission, shall render service relative to the announcement, receipt of applications, preparations, construction, and rating of examinations, and establishment and certification of eligible lists of positions in the classified service under the jurisdiction of such municipal commission. Only the state civil service department and commission shall have jurisdiction to correct any errors in rating in any examination prepared and rated by such department pursuant to the provisions of this subdivision. The sum required to be paid by applicants pursuant to section fifty of this chapter, shall be paid to the state civil service department for all examinations prepared and rated by such department.

3. Other services. The state civil service department without charge, upon the request of any municipal commission, shall furnish technical advice and assistance in the preparation and promulgation of rules or modifications thereof and in any other matters affecting the administration of the provisions of this chapter by such municipal commission.

4. Use of state eligible lists by municipal commissions. A municipal commission, in the absence of an eligible list of its own, may request the state civil service department to furnish it with the names of persons on an appropriate eligible list established by the department, which, if so requested by the municipal commission, shall be limited to residents of the city or civil division in which appointments are to be made, or to residents of the county or judicial district in which such city or civil division is located, or to any reasonable combination of political subdivisions both in and outside of New York state contiguous to

city or civil division in which appointment is to be made or contiguous to the political subdivision in which such city or civil division is located. Such municipal commission may certify and names for appointment to a position under its jurisdiction in the same manner as certifications are made from the eligible list of such commission. If the state civil service department, upon the request of such commission, has certified an appropriate list to fill a particular position, such list shall continue to be used until superseded by an eligible list established by such municipal commission for such position, or until such list expires or is exhausted or is otherwise terminated.

4-a. Residence restrictions for local positions. The state civil service department or municipal commission having jurisdiction over positions in a city or civil division may require that candidates for examination for appointment to any such position be residents of such city or civil division, or residents of the county or judicial district in which such city or civil division is located, or of any reasonable combination of political subdivisions both in and outside of New York state contiguous to such city or civil division or contiguous to the political subdivision in which such city or civil division is located. An appointing authority of a department or agency of a city or civil division may provide that eligibles who are residents of such city or civil division shall be certified first for appointment, provided, however, that such preference shall be given on appointments from promotional lists. Upon exhaustion of the list of such resident eligibles, certifications shall be made from the whole eligible list. This subdivision shall not be deemed to supersede any general or special law pertaining to residence qualifications of local officers or employees.

4-b. Geographic certification based on need. A municipal commission having jurisdiction over a city or civil division may provide that eligibles, other than those eligibles on policemen and firemen lists, who are residents of a geographically-defined area which is a portion of such city or civil division shall be certified first for appointment to positions in such area where in order to qualify for federal moneys such certification is required. Upon exhaustion of the list of such resident eligibles, certifications shall be made from the whole eligible list.

5. Construction. The provisions of this section shall not apply to the municipal commission of any city containing more than one county.

L.1938, c. 790, § 1; amended L.1963, c. 357, §§ 1, 2; L.1967, c. 2; L.1971, c. 785, § 1.

ARTICLE IV—RECRUITMENT OF PERSONNEL

Title

- A. Examinations and eligible lists
- B. Appointment and promotion

TITLE A—EXAMINATIONS AND ELIGIBLE LIST

Sec.

- 50. Examinations generally.
- 51. Filling vacancies by open competitive examination.
- 52. Promotion examinations.
- 53. Citizenship requirements.
- 54. Age requirements.
- 55. Examination of blind or physically handicapped applicants.
- 55-a. Employment of mentally retarded persons.
- 55-b. Employment of mentally retarded persons.
- 55-c. Employment of mentally retarded persons.
- 56. Establishment and duration of eligible lists.
- 57. Continuous recruitment for certain positions.
- 58. Requirements for provisional or permanent appointments of certain police officers.

§ 50. Examinations generally

1. Positions subject to competitive examinations. The qualifications and fitness of applicants for positions which are classified in a competitive class shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction.

2. Announcement of examination. The state civil service department and municipal commissions shall issue an announcement of each competitive examination, setting forth the minimum qualifications required, the subjects of the examination, and such other information as they may deem necessary. They shall advertise such examination in such manner as the nature of the examination may require.

3. Application for examination. The civil service department and municipal commissions shall require prospective applicants to file, during a prescribed time, a formal application in which the applicant shall state such information as may reasonably be required touching upon his background, experience and qualifications for the position sought, and his merit and fitness for the public service. The application shall be subscribed by the applicant and shall contain an affirmation by him that:

statements therein are true, under the penalties of perjury. The items for such application shall be furnished by said department and such municipal commissions without charge to all persons requesting the same. The department and such municipal corporations may require in connection with such application certificates of citizens, physicians, public officers or others having knowledge of the applicant, as the good of the service may require.

Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position for which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position; or

who is addicted to the use of narcotics, or who is addicted to the use of intoxicating beverages to excess; or

who has been guilty of a crime or of infamous or notorious disgraceful conduct; or

who has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from incompetency or misconduct; or

who has intentionally made a false statement of any material fact in his application; or

who has practiced, or attempted to practice, any deception in his application, in his examination, or in securing his appointment; or

who has been dismissed from private employments because of habitually poor performance.

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons

therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

5. Application fees. (a) Every applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required, shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on salaries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, the state civil service department, subject to the approval of the director of the budget, a municipal commission, subject to the approval of the governing board or body of the city or county, as the case may be, or a regional commission or person ~~or~~ officer, pursuant to governmental agreement, may elect to waive application fees, or to abolish fees for specific

classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that only the civil service department, with the approval of the director of the budget, shall have authority to waive application fees or establish a different schedule of fees for any examinations prepared and rated by the civil service department for positions under the jurisdiction of a municipal commission.

(c) All fees collected hereunder by the state civil service department, except as hereinafter provided, shall be paid into the state treasury in the manner prescribed by the state finance law.¹ Fees collected from applicants for examinations given exclusively for positions in the division of employment in the department of labor shall be held in trust until such time as the costs of such examinations have been ascertained and thereupon shall be disbursed as follows: (1) to the extent that such fees are sufficient therefor, there shall be paid into the unemployment administration fund maintained under the unemployment insurance law,² an amount equal to the costs of such examinations. Such payments shall be made on the fifth day of the month following the month in which such costs were ascertained and shall be accompanied by a detailed, verified statement and a duplicate of such statement shall be filed on the same day with the state comptroller; (2) the balance, if any, of such fees shall be paid into the state treasury pursuant to the state finance law.¹

(d) All fees collected hereunder by any municipal civil service commission shall be paid into the general fund of the municipality for which such commission has been appointed.

6. Scope of examinations. Examinations shall be practical in their character and shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of that service into which they seek to be appointed. The state civil service department or appropriate municipal commission, as the case may be, may establish an eligible list on the basis of ratings received by the candidates in the competitive portions of the examination and thereafter conduct medical, physical and other appropriate non-competitive qualifying tests from time to time as the need for certifications from the eligible list may require.

7. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection.

8. Examination of candidates unable to attend tests because of religious observance. A person who, because of his religious beliefs, is unable to attend and take an examination scheduled to be held by the state department of civil service or a municipal commission on a Saturday or on a day which is a religious holiday observed by him, shall be permitted to take such examination on some other day designated by the state department of civil service or appropriate municipal commission without any additional fee or penalty.

L.1958, c. 790, § 1; amended L.1964, c. 645, § 3; L.1966, c. 870, § 1.

¹ State Finance Law § 121.

² Labor Law § 551.

Historical Note

1966 Amendment. Subd. 8. L.1966, c. 870, § 1, eff. July 29, 1966, added subd. 8.

1964 Amendment. Subd. 3. L.1964, c. 645, § 3, eff. Sept. 1, 1964, substituted "an affirmation" for "a declaration" and "true under" for "made subject to" in sentence beginning "The application."

Derivation. Subd. 2. Civil Service Law of 1909, c. 15, § 14, subd. 2, added by L.1948, c. 70, and amended by L.1953, c. 19, § 10, and repealed by L.1958, c. 790, § 1. Said section 14 was from a prior section 14, as amended L.1911, c. 547, L.1939, c. 767, § 2; L.1939, c. 790; L.1941, c. 586, 630; L.1944, c. 376; L.1944, c. 704, § 2. Said prior section 14 derived from Civil Service Law of 1899, c. 370, § 13.

Subd. 3. Civil Service Law of 1909, c. 15, § 14, subd. 3, added by L.1948, c. 70, and amended by L.1949, c. 384; L.1953, c. 19, § 10; L.1957, c. 149, § 1, and repealed by L.1958, c. 790, § 1. For derivation of said section 14, see note under subd. 2.

Subd. 4. Civil Service Law of 1909, c. 15, § 14, subd. 4, added by L.

1948, c. 70, and amended by L.1953, c. 19, § 10, and repealed by L.1958, c. 790, § 1. For derivation of said section 14, see note under subd. 2.

Subd. 5. Civil Service Law of 1909, c. 15, § 14, subd. 5, added by L.1948, c. 70, and amended by L.1953, c. 19, § 10; L.1956, c. 639, and repealed by L.1958, c. 790, § 1. For derivation of said section 14, see note under subd. 2.

Subd. 6. Civil Service Law of 1909, c. 15, § 14, subd. 6, added by L.1948, c. 70, and repealed by L.1958, c. 790, § 1. For derivation of said section 14, see note under subd. 2.

Memorandum on 1958 Revision. "The new law [subd. 4] permits State and local commissions to disqualify persons for examination or appointment whose services have been terminated in a previous public employment without a formal removal proceeding, where it is found, after appropriate investigation or inquiry, that such termination resulted from incompetency or misconduct. It also permits the disqualification of persons who have been dismissed from private employments because of habitually poor performance. The bill

provides, however, that no person may be disqualified unless he has been given a written statement of the reasons therefor, and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification. These are all new provisions which do not appear in the present law.

"The new law [subd. 5 of this section] would permit the State Civil Service Department, with the approval of the Budget Director, or a municipal commission with approval of the local governing board or body, to waive application fees or abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of fees different from those prescribed in the law. The present law permits the waiver of fees in promotion examinations only. Governor Harriman, in his annual message to the Legislature, recommended legislation to permit the waiver of fees in open competitive examinations also. The new law would, in effect, accomplish this."

Temporary Emergency Defense Positions. Sections 1 and 2 of L.1961, c. 209, eff. Apr. 3, 1961, provided:

"Section 1. Legislative findings and intent. The legislature finds that positions in the public service having unique duties related solely to civil defense activities and without counterpart in the regular civil service have been and are under the rules of the state and municipal civil service commissions designated as temporary emergency defense positions and filled on a temporary basis during the defense emergency; that the continuing defense emergency requires the continuance of the vital services rendered by incumbents of such positions to avoid irreparable disruption of the civil defense program; and that such temporary emergency defense positions, therefore, may be treated in the same manner as regular, permanent positions and made subject to examination requirements. The legislature further finds that interruption or impairment of stability of operation of the various civil defense agencies

would gravely endanger the public safety; that a great many present incumbents of temporary emergency defense positions have served more than five and up to ten years in their positions; that the vast majority of present incumbents by their training and experience in their positions have acquired invaluable expert knowledge and skill in the administration of civil defense programs; that upon initial application of competitive class requirements to any such positions in the state or any local jurisdiction, it would not be practicable to fill them by competitive examination; and that in order to avoid any potential danger which disruption of the civil defense program might entail, it is essential that means be provided during the defense emergency to continue as permanent appointees qualified incumbents serving in temporary emergency defense positions in any jurisdiction where such positions are made subject to competitive examination requirements. It is the purpose of this act, therefore, to authorize the extension of civil service examination requirements to positions designated as temporary emergency defense positions, and to provide an orderly method for continuing in service with the rights and tenure of permanent appointees incumbents of such positions who are found fully qualified and who have served satisfactorily and continuously therein for at least one year.

"§ 2. Positions designated as temporary emergency defense positions in the service of the state or any civil division may, at the election of the state civil service commission or municipal civil service commission having jurisdiction, be made subject to procedures and requirements of the civil service law in the same manner as regular permanent positions. In case of such positions in the state service, the civil service commission shall, within three months after the date of such election, allocate such positions to appropriate jurisdictional classifications. In the case of positions in the service of a civil division, the state or municipal civil service commission ha jurisdiction

CIVIL SERVICE LAW.

§ 50

Note 1a

39. — Particular deputies held exempt

Amico v. Erie County Legislature, 36 A.D.2d 415, 321 N.Y.S.2d 134, main volume, affirmed 30 N.Y.2d 729, 332 N.Y.S.2d 898, 283 N.E.2d 769.

40. — Particular deputies held not exempt

McMahon v. Michaelian, 38 A.D.2d 60, 326 N.Y.S.2d 845, main volume, affirmed 30 N.Y.2d 507, 329 N.Y.S.2d 821, 280 N.E.2d 651.

Amico v. Erie County Legislature, 36 A.D.2d 415, 321 N.Y.S.2d 134, main volume, affirmed 30 N.Y.2d 729, 332 N.Y.S.2d 898, 283 N.E.2d 769.

60. Generally

It is duty of civil service commission, in exercise of statutory authority to classify positions, to exercise its discretion in determining the "limits of the practicable"; it is not, however, an uncontrolled discretion. Grossman v. Rankin, 1973, 78 Misc.2d 490, 356 N.Y.S.2d 921.

62. Miscellaneous positions

Amico v. Erie County Legislature, 36 A.D.2d 415, 321 N.Y.S.2d 134, main volume, affirmed 30 N.Y.2d 729, 332 N.Y.S.2d 898, 283 N.E.2d 769.

§ 44. Competitive class

32. Sheriff's department employees

Amico v. Erie County Legislature, 36 A.D.2d 415, 321 N.Y.S.2d 134, main volume, affirmed 30 N.Y.2d 729, 332 N.Y.S.2d 898, 283 N.E.2d 769.

34. Miscellaneous positions

Position of investigator in the county public defender's office was such that it was practicable to determine merit and fitness of applicants by competitive examination. Paroli v. Bolton, 1974, 44 A.D.2d 557, 352 N.Y.S.2d 512, affirmed 35 N.Y.2d 772, 362 N.Y.S.2d 150, 320 N.E.2d 866.

ARTICLE IV—RECRUITMENT OF PERSONNEL

TITLE A—EXAMINATIONS AND ELIGIBLE LISTS

Sec.

55-aa. Employment of physically handicapped persons in the county of Nassau [New].

55-aaa. Employment of physically handicapped persons in the county of Suffolk [New].

59. Placement of Erie county sheriff's department personnel in classified service [New].

§ 50. Examinations generally

[See main volume for text of 1 to 3]

4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

[See main volume for text of (a) and (b)]

(c) who is addicted to the unlawful use of narcotics, or who is addicted to the use of intoxicating beverages to excess; or

(d) who has been guilty of a crime; or

[See main volume for text of (e) to (h) and two closing pars.; 5 to 8]

As amended L.1973, c. 163, § 26; L.1973, c. 476, § 1.

1973 Amendments. Subd. 4, par.

(c). L.1973, c. 163, § 26, eff. Apr. 1, 1973, inserted "unlawful."

Subd. 4, par. (d). L.1973, c. 476,

§ 1, eff. June 5, 1973, struck out "or of infamous or notoriously disgraceful conduct".

1a. Construction with other laws

This section applying to applicants for civil service examinations and to those who become eligible for appointment after successfully passing such examination has no relevant application to removal proceedings against those holding office by permanent appointment in the competitive class of the classified civil service. Giangiacomo v. Village of Liber-

Supplementary Index to Notes
Construction with other laws 1a

9 McKinney—1 1/2
1975 P.P.

APPENDIX C

the contract was executed, the employer notified the union that the Christmas bonus for 1962 would not be paid. Such bonuses had been granted in prior years. The union on December 19, 1962 notified the employer that this decision violated the agreement. It then attempted to comply with the required grievance procedures but was thwarted by the employer which took the position that no dispute existed since the subject of bonuses was not included in the agreement and refused to comply with or participate in the prearbitration procedures.

It was error to deny the motion. As we said in *Matter of Dairymen's Coop. Assn. (Conrad)* (18 A D 2d 321, 325): "Section 1448-a of the Civil Practice Act [now a part of CPLR 7501] was intended to abrogate the *Cutler-Hammer* rule (*Matter of International Assn. of Machinists [Cutler-Hammer, Inc.]*, 271 App. Div. 917, affd. 297 N. Y. 519), under which the courts had undertaken to pass upon the tenability of the interpretations respectively advanced by the parties". The courts may no longer look to the merits of a grievance or dispute, and whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. (*Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567-568.)

Nor can arbitration be avoided where the prearbitration procedures have not been followed because the opposing party has refused to comply with its contractual obligations as to these procedures. (*Matter of Pocketbook Workers Union*, 14 Misc 2d 268, 269; *Matter of Greenstone*, 8 Misc 2d 1045, 1047; *Glass Bottle Blowers Assn. v. Arkansas Glass Container Corp.*, 183 F. Supp. 829, 831.)

The order appealed from should therefore be reversed and the motion granted.

WILLIAMS, P. J., BASTOW, HENRY and NOONAN, JJ., concur.

Order unanimously reversed, with costs and motion granted, with \$10 costs.

In the Matter of WILLIAM A. CAPARCO et al., Constituting the Municipal Civil Service Commission of the City of Rochester, Appellants, v. H. ELIOT KAPLAN et al., Constituting the State Civil Service Commission, et al., Respondents.

Fourth Department, January 15, 1964

Municipal corporations—civil service system—home rule—City of Rochester transferring its civil service system to County Civil Service Commission, had power to create new Municipal Civil Service Commission and to retransfer such system to it; County Civil Service Commission must

turn over records to Municipal Civil Service Commission (N. Y. Const., art. IX, § 12; City Home Rule Law, § 11, subd. 1; Civil Service Law, art. II) — State Civil Service Commission must pass upon Rules of Municipal Civil Service Commission (Civil Service Law, § 20).

The City Council of the City of Rochester, acting under the Optional County Government Law (§ 1008), enacted an ordinance and a local law in December, 1961, abolishing the City Civil Service Commission and transferring its members and functions to the Civil Service Commission of the County (of Monroe). Then, in January, 1962, the City Council enacted an ordinance and a local law revoking such prior act, and creating a Municipal Civil Service Commission consisting of three members appointed by the City Manager, and retransferring the city's civil service system to such municipal commission. Such ordinance and local law are valid. A city's administration of its own civil service system is a matter relating to the property, affairs or government of the city (N. Y. Const., art. IX, § 12; City Home Rule Law, § 11, subd. 1; see, also, General City Law, § 20, subd. 18, and Civil Service Law, art. II); and such a change in the administration of a city's civil service system is expressly sanctioned by the Civil Service Law (§ 16); and such appointment of a three-member Municipal Civil Service Commission is authorized by the local law and by the Civil Service Law (§ 15, subd. 1, par. [a]). An order is granted (Civ. Prac. Act, art. 78) directing the County Civil Service Commission to turn over all records pertaining to the city's civil service employees to the Municipal Civil Service Commission, and directing the State Civil Service Commission to accept the Rules of the Municipal Civil Service Commission for approval or disapproval (Civil Service Law, § 20).

Matter of Caparco v. Kaplan, 38 Misc 2d 1058, reversed.

APPEAL from an order of the Supreme Court at Special Term (DOMENICK L. GABRIELLI, J.) entered March 7, 1963 in Monroe County, dismissing a petition under article 78 of the Civil Practice Act.

Arthur B. Curran, Jr., Corporation Counsel (Jack Goodman of counsel), for appellants.

Louis J. Lefkowitz, Attorney-General (Latimer B. Senior, Paxton Blair and Herbert H. Smith of counsel), for New York State Civil Service Commission, respondent.

Leo T. Minton, Monroe County Legal Adviser (Raymond H. Schwartz of counsel), for Monroe County Civil Service Commission, respondent.

Per Curiam. This appeal arises out of a controversy between county and municipal governments concerning the administration of civil service in the City of Rochester. It began by the institution of an article 78 (Civ. Prac. Act) proceeding by which the petitioners-appellants, who constituted the Municipal Civil Service Commission of the City of Rochester, sought an order " (a) annulling and setting aside the determination made by the respondent, the State Civil Service Commission, in which said

respondent refused to accept for approval or disapproval the Rules of the Municipal Civil Service Commission of the City of Rochester adopted by the petitioners on April 5, 1962, and (b) compelling the respondent, the State Civil Service Commission, to approve said Rules, if satisfactory, pursuant to Section 20 of the Civil Service Law of New York, and (c) compelling the respondent, the Monroe County Civil Service Commission, to terminate its administration of the civil service in the City of Rochester and to turn over to the petitioners all the records pertaining to the civil service employees of the City of Rochester".

In order to put this appeal in proper perspective it is necessary to give the background of the administration of civil service in the city and county prior to February, 1961. Before that date both the city and the county had separate Civil Service Commissions, the city administering its commission pursuant to the provisions of the city charter. By act of the State Legislature (L. 1961, ch. 565; Optional County Government Law, § 1008, eff. April 12, 1961) an amendment was made to the Optional County Government Law to increase the membership of any civil service commission in a county having adopted the county manager form of government pursuant to plan "B" and to provide that any city wholly within such county might withdraw from the municipal civil service commission and transfer its jurisdiction to county's civil service commission "without restrictions relating to effective date". It should be noted that Monroe County is the only one in the State which adopted and is operating under the county manager form of government pursuant to plan "B" (cf. *Matter of Dutcher v. Hatch*, 19 A D 2d 341). Section 1008 provides that "Notwithstanding any inconsistent provisions of any general, special or local law, if the council or other legislative body in a city wholly within a county which has adopted plan 'B' authorizes the withdrawal of the city from its existing form of civil service administration and elects that the provisions of civil service law shall be administered in such city under the jurisdiction of the civil service commission of the county", it may do so pursuant to specific provisions as to composition, method of selection of commissioners and terms of office.

On December 12, 1961 the legislative body of the city (the Council) by Ordinance No. 61-506 elected to withdraw the civil service system from the administration of the City Civil Service Commission and transfer it to the Monroe County Civil Service Commission, pursuant to the authority granted by section 1008 of the Optional County Government Law. Simultaneously

therewith, the City Council enacted Local Law No. 7 abolishing the City Civil Service Commission, effective December 15, 1961, and transferring its members to the County Civil Service Commission. The City Council thereafter, on January 23, 1962, adopted Local Law No. 1 of 1962 (eff. Jan. 29, 1962) and Ordinance No. 62-18, by which it purported to revoke the action taken by the City Council on December 12, 1961, created a new City Civil Service Commission and provided for a retransfer of the city civil service system to the reactivated City Civil Service Commission. This commission adopted proposed rules and regulations, pursuant to section 20 of the Civil Service Law, which the State Commission declined to accept upon the ground that under section 1008 of the Optional County Government Law the city had no authority to establish the new Civil Service Commission. It is in this posture which the matter now comes before us.

The main thrust of appellants' position is that section 1008 of the Optional County Government Law is in violation of section 11 of article IX of the State Constitution and that this contention involves three subsidiary issues:

1. Was the law an act in relation to the property, affairs, or government of any city within the meaning of section 11 of article IX?
2. Was it a local law within the meaning of section 11 of article IX, in that it did not apply alike to all cities?
3. If it is a local law applying only to Rochester and concerns its property, affairs or government did the Legislature receive a proper home rule request from the Mayor of the City of Rochester concurred in by the Common Council as required by section 11 of article IX?

We find it unnecessary to reach or pass upon these issues, as a further contention of appellants, hereinafter discussed, is dispositive of the appeal. This further contention of appellants is that, even if section 1008 is constitutional, the city possessed the right, pursuant to subdivision 1 of section 11 of the City Home Rule Law, to take the legislative action it did in revoking the transfer of civil service administration from city to county and in recreating the Municipal Civil Service Commission. So far as its application is pertinent here that section of the City Home Rule Law provides: "1. Subject to the restrictions provided in this chapter, the local legislative body of a city shall have power to adopt and amend (a) local laws in relation to the property, affairs or government of the city. Local laws adopted pursuant to (a) or (b) of this subdivision may

change or supersede any provision of an act of the legislature theretofore enacted which provision does not in terms and effect apply alike to all cities."

Respondents urge, in answer to appellants' contention, that section 1008 of the Optional County Government Law does not relate to property, affairs or government of the City of Rochester and that the Home Rule Law is not applicable. Civil service, they assert, is a matter of paramount State concern and relates to matters other than the property, affairs or government of the City of Rochester. In our view, the administration of civil service is not capable of such precise classification. It is true that any issue substantially affecting the merit system is a matter of primary State concern because the whole fabric of civil service depends upon adherence to the principle of the merit system based upon competitive examinations (N. Y. Const., art. V, § 6; *Matter of Meenagh v. Dewey*, 286 N. Y. 292; *Matter of Friedman v. Finegan*, 268 N. Y. 93). Yet, as to the administration of the Civil Service Law, the functions of both State and local (either county or municipal) commissions are recognized as separate, each with its own prerogatives (Civil Service Law, art. II, §§ 5-9, 15-27; General City Law, § 20, subd. 18; *Matter of Ebling v. New York State Civ. Serv. Comm.*, 305 N. Y. 221; *Matter of Woods v. Finegan*, 246 App. Div. 271). The municipal commission is not a mere appendage to the State system but is an integral and yet independent facility enjoying substantial autonomy as to singularly local problems and solutions. There is no problem as to change in the form of administration of civil service from a county commission to a municipal commission or vice versa. The Civil Service Law expressly sanctions such change in the form of administration, if a city or county so elects (Civil Service Law, § 16, subd. 1, pars. [a] and [b]; subd. 2, par. [a]).

The City Council of Rochester has the power validly to establish a City Municipal Commission pursuant to section 12 of article IX of the State Constitution, and subdivision 1 of section 11 of the City Home Rule Law. The local administration of civil service is a matter relating to the property, affairs or government of any city, within the meaning of section 12 of article IX of our State Constitution and the subject matter of any law pertaining to the administration of local civil service constitutes a local, as opposed to a general, law. The cases relied upon by the respondents where it was determined that matters of paramount State concern were at issue as opposed to predominantly local interests all involved either the exercise

of police power of the State in protecting the health and public welfare (*Whalen v. Wagner*, 4 N.Y.2d 575; *New York Steam Corp. v. City of New York*, 268 N.Y. 137; *Adler v. Deegan*, 251 N.Y. 467) or a business in which the public had an interest (*County Securities v. Seacord*, 278 N.Y. 34; *Matter of McCabe v. Voorhis*, 243 N.Y. 401; *Admiral Realty Co. v. City of New York*, 206 N.Y. 110; *Kelly-Sullivan, Inc. v. Moss*, 174 Misc. 1098, affd. 260 App. Div. 921) or the subject matter so patently affected residents of the entire State (*Robertson v. Zimmermann*, 268 N.Y. 52) that the State's concern was obviously overriding. Not so in respect of the local administration of civil service which does not involve an exercise of the police power of the State and is analogous to those cases which hold that administrative control of a municipal agency is a matter of local concern and comes within the definition of property, affairs or government of any city (*Matter of Holland v. Bankson*, 290 N.Y. 267; *Matter of Osborn v. Cohen*, 272 N.Y. 55; *Bareham v. City of Rochester*, 246 N.Y. 140). We hold that the City Council of the City of Rochester in January, 1962 had the authority, pursuant to subdivision 1 of section 11 of the City Home Rule Law to establish the Municipal Civil Service Commission and to revoke the prior election to change the form of civil service from city to county administration.

The respondent County Civil Service Commission raises a jurisdictional question in its contention that appellants have no legal capacity to institute these proceedings, for the City Civil Service Commissioners were not "duly appointed". If the City Council acted validly in establishing the Municipal Civil Service Commission, as we hold it did, it certainly had the right and authority to establish itself with a full complement of three members as provided by the amendment to the city charter which reinstated the provisions thereof relating to the establishment of a Municipal Civil Service Commission. The county contends that the local law provided no means of appointing members of the newly formed commission and their argument is premised on the fact that there was no language similar to that found in the 1925 city charter provisions which perpetuated the commissioners in office in 1925 until their respective terms expired. The local law provides that the City Manager shall appoint members to the commission and that in May of each even-numbered year commissioners shall be appointed for a term of six years. Furthermore, the procedure for appointment is spelled out in paragraph (a) of subdivision 1 of section 15 of the Civil Service Law which specifically provides for the appointment of the original members of a commission for the

expiration of their terms, and for the appointment of new members.

The order appealed from should be reversed and the relief demanded in the petition granted.

WILLIAMS, P. J., BASTOW, GOLDMAN and HENRY, JJ., concur.

Order unanimously reversed and petition granted, without costs of this appeal to any party.

In the Matter of ARTHUR BENNETT, an Attorney, Respondent.
CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK et al., Petitioners.

First Department, January 30, 1964.

Attorney and client—disciplinary proceedings—charges sustained by Referee against respondent, attorney at law, involving claims presented to insurance carriers and failure to preserve pleadings and other papers are confirmed—charge of knowingly submitting false loss of time and earning figures to insurance carriers, found not sustained by Referee, is sustained—charge of making payments of compensation or gratuities to employee of insurance carrier for corrupt influence sustained—requirement of due process met—charges sustained establish flagrant professional misconduct—respondent disbarred.

1. A Referee sustained the specifications of a charge against respondent of knowingly submitting false loss of time and earning figures to insurance carriers relating to two named persons, and also sustained charges against respondent of conspiring to submit false personal injury claims to an insurance carrier; of settling claims of infants without procuring court orders approving such compromises and fixing legal fees; of using the name of another attorney, with his permission, as attorney for claimants and parties in actions, whereas, in fact, such other attorney had not been so retained, in order to conceal the true name of the attorney for such persons, knowingly submitting false loss of earning statements to an insurance carrier and paying a percentage of settlement to an employee of such insurance carrier for the purpose of corruptly influencing him, and of failure to preserve pleadings and other papers for the required period. These findings of the Referee are supported by the record and are confirmed. In addition, the evidence sustains a specification on the first charge relating to another named person.

2. As to the charge against respondent of making payments of compensation or gratuities to an employee of an insurance carrier to corruptly influence the adjustment of personal injury claims of persons represented by respondent, either as attorney or as counsel to another attorney, the Referee's finding that this charge was not sustained should be disaffirmed and the charge sustained.

3. The record establishes no factual basis for the contention that the requirements of due process were not met.

4. The charges and specifications sustained establish flagrant professional misconduct and respondent should be disbarred.

DISCIPLINARY PROCEEDINGS instituted by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association

and the Bronx County Bar Association. Respondent was admitted to the Bar on January 21, 1942, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

Henry Weiner (Allen Harris of counsel), for petitioners.

Leonard Feldman for respondent.

Per Curiam. Respondent, 43, was admitted to practice at a term of the Appellate Division, Second Department, in January, 1942, and has been actively engaged therein except for a period of four years in the military service.

The petition alleges nine charges of professional misconduct; one was withdrawn (Charge 7). The remaining charges are as follows:

Charge 1. Knowingly submitting false loss of time and earnings figures to insurance carriers.

Charge 2. Conspiring to submit false personal injury claims to an insurance carrier.

Charge 3. Knowingly submitting false medical reports.

Charge 4. Making payments of compensation or gratuities to an employee of an insurance carrier to corruptly influence the adjustment of personal injury claims of persons represented by respondent, either as attorney or as counsel to another attorney.

Charge 5. Knowingly submitting false bills of particulars of injuries and special damages.

Charge 6. Settling claims of infants without procuring court orders approving such compromises and fixing legal fees.

Charge 8. Using the name of another attorney, with his permission, as attorney for claimants and parties in actions, whereas, in fact, such other attorney had not been so retained, in order to conceal the true name of the attorney for such persons; knowingly submitting false loss of earnings statements to an insurance carrier and paying a percentage of settlement to an employee of such insurance carrier for the purpose of corruptly influencing him.

Charge 9. Failure to preserve pleadings and other papers for the period required by rule IV-F of the Special Rules Regulating Conduct of Attorneys of the Appellate Division, First Department (now rule IV, subd. [6]).

As to Charge 1 the Referee sustained the specifications relating to Irving Blum and Martin Albin. The specifications relating to Alvin Denbaum, Sherman Ingraham (true name Ingram) and Alfred Silman.